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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 49

THE UNITED STATES OF AMERICA, PETITIONER

vs.

EDWARD RYAN, CLAIMANT OF ONE BRUNSWICK BAR, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 17, 1931
CERTIORARI GRANTED MAY 25, 1931

(35811)

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In the District Court of the United States, District of Montana, Butte Division.

No. 545.

UNITED STATES OF AMERICA,

Libelant,

vs.

GEORGE LEWIS (*alias* ED. DAVIS), and 1 Brunswick Balke Bar and Back Bar, etc.,

Libelees.

LIBEL OF INFORMATION.

The United States of America, by Arthur P. Acher, Assistant United States Attorney for the District of Montana, brings this libel of information against the libelees above named, and alleges:

1. That on or about the 24th day of February, 1930, at and within that certain soft drink parlor operated by the defendant and located at No. 7 West Galena Street, in the city of Butte, county of Silver Bow, State and District of Montana, within the Internal Revenue Collection District of Montana and the 19th Prohibition District and within the jurisdiction of this court, Ben Holter, Carroll A. Olson and George W. Doyle, Federal Prohibition Agents, seized on land, the following described goods, merchandise, articles, objects and personal property, to wit: 1 Brunswick Balke bar and back bar, complete with mirrors, 1 Pick & Co. electric water heater, 1 Hamilton Beach electric mixer, #10M602419A, 1 National Cash Register, size 1006,

#S297932 D. D., 1 Regulator wall clock, 1 settee, 1 card table, 1 4-ft. show-case, 3 wire back chairs, 4 cuspidors, 1 14-ft. iron floor mat, 1 cigar case—top and 3 sides broken, 2 davenport ends, 1 davenport base—2 pieces, 1 davenport back, 1 floor mat, 1 back bar in 3 sections, 1 mirror frame, 2 mirrors, 11 pieces marble, 2 pieces back bar top, 2 end posts, 1 wash rack—3 sections, 2 [1*] pieces molding, 1 card table, 1 clock, 2 sm. posts, 3 iron chairs, 1 bar front and ends—3 pieces, 1 large picture, 1 bar top and 4 cuspidors.

2. That on said date the defendant George Lewis, *alias* Ed. Davis, at and within the premises hereinbefore described, did then and there wilfully, wrongfully unlawfully and feloniously have in his possession and custody and within his control certain goods, wares and merchandise, to wit, whiskey, beer and gin, a more particular description of which is to your informant unknown, intoxicating in character and fit for use and intended for sale for beverage purposes, which said intoxicating liquors were goods and commodities for and in respect whereof a tax was then and there due and unpaid, which said intoxicating liquors were then and there in the possession, custody and control of said defendant for the purpose of being sold or removed by him in fraud of the internal revenue laws of the United States of America and with the design to avoid the payment of said taxes, then and there due and unpaid; contrary to the form of the statute in such

*Page-number appearing at the foot of page of original certified Transcript of Record.

case made and provided, and against the peace and dignity of the United States of America; that said property described in paragraph 1 hereof, at the time of and prior to said seizure, was in the place and building where said intoxicating liquors were found and in the possession of and under the custody and control of said defendant.

3. That by reason of the premises the said goods, merchandise, articles, objects and personal property has become and is subject to forfeiture and condemnation; and that before the commencement hereof the seizure above mentioned was adopted by the Federal Prohibition Administrator for said district, and said property is now in his possession in storage at the Jones Storage and Transfer Company, at Butte, Montana.

WHEREFORE, libelant prays that due process issue hereon; that a time and place be fixed for the trial and hearing of this libel upon due notice to all persons concerned; and that upon said hearing said property be condemned and forfeited to the United States, and that the same may be sold or otherwise disposed of [2] as provided by law.

ARTHUR P. ACHER,

Assistant United States Attorney for the District of Montana.

Duly verified by Arthur P. Acher.

Filed March 21st, 1930. [3]

NOTICE OF SEIZURE.

In the District Court of the United States, District of Montana, Butte Division.

UNITED STATES OF AMERICA,

Libelant,

vs.

GEORGE LEWIS (*alias* ED DAVIS), One Brunswick Bar and Back Bar, Complete With Mirrors, etc.,

Libelees.

NOTICE IS HEREBY GIVEN that a libel of information has been filed by libelant in the above-entitled court and cause;

That by order of court there has been seized at Butte, within the state and District of Montana, 1 Brunswick Balke bar and back bar, complete with mirrors, 1 Pick & Co. electric water heater, 1 Hamilton Beach electric mixer, No. 10M602419A, 1 National cash register, size 1086, No. S297932 D. D., 1 Regulator wall clock, 1 settee, 1 card table, 1 4-ft. show-case, 3 wire back chairs, 4 cuspidors, 1 14-foot iron floor mat, 1 cigar case, top and 3 sides broken; 2 davenport ends and 1 davenport base, 2 pieces; 1 davenport back, 1 floor mat, 1 back bar in 3 sections, 1 mirror frame, 2 mirrors, 11 pieces marble, 2 pieces back bar top, 2 end posts, 1 wash rack, 3 sections; 2 pieces molding, 1 card table, 1 clock, 2 sm. posts, 3 iron chairs, 1 bar front and ends, 3 pieces, 1 large picture, 1 bar top and 4 cuspidors, which said prop-

erty is held by the United States Marshal for Montana.

It is prayed in said libel of information that said property be condemned and forfeited to the United States upon the following ground:

That on or about the 24th day of February, 1930, one George Lewis, *alias* Ed Davis, whose true name is to the information unknown, at and within that certain soft drink parlor operated by the defendant and located at No. 7 West Galena street, in the city of Butte, county of Silver Bow, state and district of Montana, did, then and there, wilfully, wrongfully and feloniously have in his possession and custody and within his control certain goods, wares and merchandise, to-wit: whiskey, beer and gin, a more particular description of which is to your informant unknown, intoxicating in character and fit for use and intended for sale for beverage purposes, which said intoxicating liquors were goods and commodities for and in respect whereof a tax was then and there due and unpaid, which said intoxicating liquors were then and there in the possession, custody and control of said defendant for the purpose of being sold or removed by them in fraud of the internal revenue laws of the United States of America and with the design to avoid the payment of said taxes then and there due thereon and unpaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America; and that said goods, merchandise, articles, objects and personal property hereinbefore described at the time

of and prior to the seizure hereof, were in the place and building where said intoxicating liquors were found and in the possession of and under the custody and control of said defendant.

Notice is further given that by order of court all persons having or claiming any interest in said articles seized or having anything to say why the *said should* not be condemned and forfeited, appear and file their respective answers and defenses to such information setting forth their interests in or claim to said property libeled, with the clerk of the above-named court at Butte, Montana, on or before the 21st day of April, 1930, the same being the time and place hereby fixed for the return date hereon.

Dated March 21, 1930.

TOM BOLTON,
United States Marshal for the District of Montana.
By J. L. Callahan,
Deputy. [4]

PUBLISHER'S AFFIDAVIT.

State of Montana,
County of Silver Bow,—ss.

Before me, the undersigned, notary public, this day personally came C. L. Peterson, who, being first duly sworn, according to law, says that he is the principal clerk of "Butte Daily Post," a daily newspaper published at Butte, in said county and State, and that the publication, of which the annexed is a true copy, was published in said paper on the 25th day of March, 1930, and once each week there-

after for one consecutive week and that the rate charged therefor is not in excess of the commercial rates charged private individuals, with the usual discounts.

C. L. PETERSON.

Subscribed and sworn to before me this 2d day of April, 1930.

[Notarial Seal] HELEN BRENNAN,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires February 18, 1931. [5]

[Title of Court and Cause.]

MARSHAL'S RETURN.

United States of America,
District of Montana,—ss.

I hereby certify and return that I received the within warrant of arrest and monition on the 21 day of March, 1930; that I executed the same on the 24 day of March, 1930, by attaching the following articles stored with the Jones Storage and Transfer Co., at Wyoming and Iron Streets, Butte, Montana, to wit:

1 Cigar Case—Top Glass and 3 Sides Broken.
2 Davenport Ends.
1 Davenport Base in 2 Pieces.
1 Davenport Back.
1 Floor Mat.
1 Back Bar—3 Sections.

1 Mirror Frame.
2 Mirrors.
11 Pcs. Marble.
2 Pcs. Back Bar Tops.
2 End Posts.
1 Wash Rack—3 Sections.
2 Pcs. Molding.
1 Card Table.
1 Mixing Machine—Electric.
1 Cash Register.
1 Water Heater—Electric.
2 Small Posts.
3 Iron Chairs.
1 Bar Front & Ends—3 Pcs.
1 Clock.
1 Large Picture.
1 Bar Top.
4 Cuspidors.

That I then and there appointed R. T. McCulloh, President of the Jones Transfer Co., as custodian and served him with copies of Warrant of Arrest and Monition and Notice of Seizure; that I caused to be published in the "Butte Daily Post," a newspaper [6] of general circulation published at Butte, Montana, Notice of Seizure, publisher's affidavit being hereto attached and made a part of this return; that I also posted copy of said notice at the County Courthouse at Butte, Montana, on the 24 day of March, 1930; that there is hereto attached and made a part of this return receipt for the property attached, signed by R. T. McCulloh, Custodian;

that I also served copy of warrant on Geo. Lewis on March 21, 1930, at Butte, Montana.

Butte, Montana, April 11, 1930.

TOM BOLTON,
U. S. Marshal.
By James J. Maloney,
Deputy. [7]

[Title of Court and Cause.]

ANSWER AND DEFENSE OF EDWARD RYAN.

Comes now Edward Ryan and makes answer and defense to the libel and information on file herein, and admits, denies and alleges:

I.

Specifically denies that by an order of court there has been seized at Butte, within the State and District of Montana, 1 Brunswick Balke bar and back bar, complete with mirrors; 1 Pick & Co. electric water heater; 1 Hamilton Beach electric mixer, No. 10M602419A; 1 National cash register, size 1086, No. S297932 D. D.; 1 Regulator wall clock; 1 settee; 1 card table; 1 four-foot show-case; 3 wire back chairs; 4 cuspidors; 1 14-foot iron floor mat; 1 cigar case, top and 3 sides broken; 2 davenport ends and 1 davenport base, 2 pieces; 1 davenport back; 1 floor mat; 1 back bar in 3 sections; 1 mirror frame; 2 mirrors; 11 pieces marble; 2 pieces back bar top; 2 end posts; 1 wash rack, 3 sections; 2

pieces molding; 1 card table; 1 clock; 2 small posts; 3 iron chairs; 1 bar front and ends, 3 pieces; 1 large picture; 1 bar top; and four cuspidors, but admits said property is held by the United States Marshal for Montana.

II.

Admits it is prayed in said libel of information that said property be condemned and forfeited to the United States upon the grounds therein specified, and admits that the property above described was at the time of its seizure in the place or building known and designated and [8] located at No. 7 West Galena Street, in the city of Butte, county of Silver Bow, State and District of Montana.

III.

Alleges the fact to be that the seizure of said property was made under and by virtue of a search-warrant on the 24th day of February, 1930, on which said day one Ben Holter, a National Prohibition Enforcement Officer, operating within the jurisdiction of this court, did apply to L. M. Van Etten, a United States Commissioner for the District of Montana, residing at Butte, Montana, for a search-warrant, basing his right thereto upon the affidavit of one Carroll A. Olson, theretofore filed with said Commissioner, wherein he averred that on the 3d day of February, 1930, one John Doe Eddy sold to him moonshine whiskey on the ground floor of the brick building located at 7 West Galena Street, Butte, Montana, which said application was granted, and a search-warrant issued pursuant thereto

under the hand and seal of the office of said Commissioner, directing and commanding the said Ben Holter to make execution thereof in that certain place, room or building more particularly described as a saloon on the ground floor of a certain three-story brick building at 7 West Galena Street, in the City of Butte, State of Montana, and did command the said Ben Holter, in the name of the President of the United States, to enter said premises in the daytime with necessary and proper assistance, and: "There diligently search for said intoxicating liquors, vessels, bottles and containers of said liquors, whether in the said premises or on the person of the said keeper or other persons present and all utensils, apparatus and materials for the manufacturing of intoxicating liquors, or for the storing and possessing of the same, and all evidence of crime, of manufacturing, purchasing, possessing, selling or disposing of intoxicating liquors, as may be therein found in the form of books, receipts, recipes for manufacturing or compounding intoxicating liquors, receipts, bills of lading, notes, checks, liquor labels, letters and other such evidences, whether found in the premises or on said persons, and to report and act concerning same, as required by law, and to seize, secure and bring said property with a return of your action thereunder to the undersigned. [9]

IV.

That, armed with the said search-warrant, the said Ben Holter, National Prohibition Enforcement

Officer aforesaid, with necessary and proper assistance, did enter into and upon said premises, and did find therein and in charge thereof one George Lewis, the libelee above named, and did discover therein, as disclosed by his verified return to said search-warrant, thereafter rendered, one gallon of whiskey, seven pints of home brew beer, one and one-half gallons of gin, which, under the specific language of said search-warrant, he did lawfully seize, with their containers, and at the same time and place, and with his sole and only authority the powers conferred by the search-warrant aforesaid, and the National Prohibition Act, he, acting under and by virtue of the authority conferred by said search-warrant, issued under and by authority of the provisions of the said National Prohibition Act, did unlawfully exceed the powers conferred by the National Prohibition Act, and the express limitations of said search-warrant, by then and there seizing and taking into his possession the articles of personal property itemized in paragraph I hereof, and did on the same day make return on said search-warrant to the said United States Commissioner of a portion of the articles so seized, and the said United States Commissioner did thereafter certify the whole of said proceedings to the above-entitled court, in a cause therein pending entitled: "United States of America, Plaintiff, v. George Lewis, Defendant."

V.

That the property so seized and removed from

the said premises, as described in paragraph I hereof, consists of apparatus and trade fixtures, not embraced within the scope of the provisions of the National Prohibition Act as being the subject of seizure upon a violation of its terms concerning the unlawful possession of intoxicating liquor, but, notwithstanding the premises, the said Ben Holter, National Prohibition Enforcement Officer, after the seizure of said property was made by him as aforesaid, did deliver possession thereof to the United States Marshal for the District of Montana, as this answering libelee is informed and believes, and therefore states as a fact, prior to the [10] filing of the libel of information herein.

VI.

Your claimant, Edward Ryan, alleges that on the said 24th day of February, 1930, when the seizure of said personal property, apparatus and trade fixtures was made by the said Ben Holter, Prohibition Officer, he was the owner and entitled to the possession of all thereof; that he continued to be and was the owner and entitled to the possession thereof when the libel of information was filed herein, and now is the owner and entitled to the immediate possession thereof; that none thereof was, or is, designed for the manufacture of intoxicating liquor, or intended for *us* in violating the provisions of the National Prohibition Act, and none thereof is designed for use as containers of intoxicating liquor, but all thereof, at and prior to the time of its seizure aforesaid, was used as apparatus and trade

fixtures for the purpose of operating, running and conducting a soft drink parlor, including cigars, cigarettes and tobacco.

VII.

Your claimant specifically denies that all or any of said property was seized, or claimed to have been seized, or to be the subject of forfeiture for any violation of the Internal Revenue laws of the United States of America, in particular, for a violation of Section 1185, Title 26, U. S. Codes.

VIII.

This claimant denies the allegations of said libel of information not hereinabove specifically admitted or denied.

IX.

Your claimant further alleges that at the time of the filing of the libel of information herein the libelee, George Lewis (*alias* Ed Davis), had not been, and at the time of the filing of this Answer, defense and claim, has not been, convicted of the crime charged against him in the libel of information herein, and he has not been charged with nor convicted of any fraud of the Internal Revenue laws of the United States of America justifying the seizure of said property, or the institution of any libel [11] of information against the same or any part thereof, or at all, either for a violation of the Internal Revenue laws of the United States of America, of of the National Prohibition Act.

X.

That by virtue of the premises your claimant, Edward Ryan, as owner of said property, apparatus and trade fixtures, alleges he is entitled to an immediate return thereof, attached and in place, restored and affixed, as they were at and prior to the time of their seizure aforesaid.

WHEREFORE, claimant, Edward Ryan, prays that he be decreed to be the owner and entitled to the immediate possession of the articles, apparatus and trade fixtures itemized in paragraph I hereof; that they be restored to his possession at said number 7 West Galena Street, Butte, Montana, from which place they were removed, and that they be restored therein, attached and affixed, and therein deposited, as the same were at the time of the seizure thereof.

General relief.

EDWARD RYAN,
Claimant.

GEORGE D. TOOLE,
C. S. WAGNER,
Attorneys for Claimant. [12]

Duly verified.

Filed April 21st, 1930. [13]

[Title of Cause.]

MINUTES OF COURT—MAY 20, 1930—TRIAL.

This cause came on regularly for trial this day, the District Attorney appearing for the United

States, and Geo. D. Toole and C. S. Wagner, appearing for Edward Ryan, Claimant. Thereupon the following named persons were duly empaneled, accepted and sworn as a jury to try the cause, viz.: Fritz Lueck, James J. McGrath, W. F. Dudley, William B. Lyons, Erick Nelson, Ira M. Wagner, Edward A. Yeager, F. J. Peppin, J. E. Shaw, Andrew Halonen, Thos. J. O'Connor, and John Gaffney. Thereupon Geo. W. Doyle, C. A. Olson and Ben Holter were sworn and examined as witnesses for the United States, whereupon the United States rested. Thereupon Edward Ryan was sworn and testified in his own behalf, and the files in criminal case No. 2449 were introduced in evidence, whereupon claimant rested.

Thereupon plaintiff moved for a directed verdict in its favor and against the claimant for the reason that it is admitted by the answer that intoxicating liquor and the personal property sought to be libelled were found in the same place, room and building, and that there were no revenue stamps on the containers of liquor showing payment of tax on intoxicating liquor, and the burden is on the claimant to prove payment of the tax.

Thereupon the claimant moved the court for a directed verdict in his favor and against the United States for the reason that the United States having heretofore indicted the defendant Lewis herein under the National Prohibition Act, cannot now proceed to libel property seized under the revenue laws of the United States.

Thereupon, by agreement and consent of the parties, a jury was at this time duly waived and the cause left to the court for decision, the arguments being continued until May 27, 1930. Thereupon the jury was excused from further consideration of the case. [14]

[Title of Cause.]

MINUTES OF COURT—MAY 23, 1930—ORDER FORFEITING BONDS.

The defendants in the above-entitled cases were duly called for arraignment, plea and trial this day, and failing to appear, on motion of the District Attorney, Court ordered that the default of the said defendants be and hereby is duly entered herein; that the defendants' bonds be and are forfeited and bench warrants ordered issued for their arrest, new bonds being fixed at $500.00 each.

Whereupon on motion of the District Attorney, it is considered by the Court that for the defaults aforesaid, the said defendants and their bondsmen forfeit and pay to the United States the amount of said defendants' bonds herein, unless they appear before this Court and show sufficient cause to the contrary. The usual writs of *scire facias* were ordered issued accordingly. [15]

[Title of Cause—Nos. 545, 552.]

MINUTES OF COURT—MAY 29, 1930—ORDER OF ENTRY FOR DECREE.

These causes heretofore duly heard and submitted to the Court came on regularly for the judgment and decision of the Court. Thereupon, after due consideration, court filed its written decision and ordered that a decree be entered in favor of the United States in each case. [16]

[Title of Court and Cause—Nos. 545, 552.]

OPINION.

Libels to establish forfeiture and to condemn certain personal property for that the articles were in buildings wherein intoxicating liquors were possessed for sale without payment of the taxes due thereon, with design to avoid payment of the tax. Claimants other than the defaulting taxpayers appear and defend.

In the Lewis case, it appears the premises were the usual soft drink establishment wherein Lewis and others were retailing "moonshine whiskey for beverage purposes, and search disclosed the usual trivial stock on hand discoverable, viz.: One gallon of the "moon," *on* and a half gallons of gin, and twenty-seven pints of home brew beer. The con-

tainers were without tax stamps, but the very existence of such liquors is sufficient evidence of internal revenue taxes due and unpaid. Lewis and another were arrested and all articles were seized. Those arrested were prosecuted for violation of the National Prohibition Act, Lewis defaulted, the other plead guilty, and this proceeding was instituted. The arrests and seizure were by prohibition agents.

In the Anderson case, the facts are practically likewise.

Section 1185, T. 26, U. S. C. A., provides that any articles [17] on which internal revenue taxes are imposed, in possession for the purpose of being sold with design to avoid payment of the tax, may be seized by a collector specially authorized by the Commissioner of Internal Revenue, and forfeited to the United States; and that all personal property whatsoever in the building or inclosure wherein said articles are found, may also be so seized and forfeited.

All persons know these liquors are subject to tax; that in existence and being sold for beverages, the taxes are due and unpaid, and the whole unlawful, the sellers are proceeding secretly, to avoid detection by Government, and so, to defeat collection of the tax. They are incited by several evil designs and intents. The claimants argue, however, that this internal revenue statute is repealed by Sec. 39, T. 27, U. S. C. A., which provides that liquor unlawfully possessed and all property designed for unlawful manufacture shall be destroyed

unless the court orders otherwise, if not by Section 34, Id., providing for abatement of liquor nuisances. Various cases are cited to the contention that the internal revenue statutes are thus impliedly repealed by the Prohibition Act. In the beginning many were inclined to so hold. See U. S. vs. Herter, 24 Fed. (2d) 112; Id., 30 Fed. (2d) 970.

Congress applied a sharp corrective rap over the knuckles by the Willis-Campbell Act. None the less, again is some inclination manifested to avoid its intent by construction, perhaps calling for new and more emphatic legislation. The Act last aforesaid provides that despite the Prohibition Act, the internal revenue laws "continue in force. . . . except such provisions of such laws as are directly in conflict with" the Prohibition Act. It is obvious there is no direct or any conflict between Section 1185, *supra,* and Sections 34, 39, *supra,* of the Prohibition Act.

See U. S. vs. One Ice Box, et al., 37 Fed. (2) 120. The Waterloo etc. Corp., case, recently decided by the C. C. A. 2d Circuit, not yet reported. [18]

The Government's case is made out, the articles were forfeited and now condemned, and decrees are rendered accordingly. May 29th, 1930.

BOURQUIN, J.

Filed May 29th, 1930. [19]

[Title of Cause—Nos. 545, 552.]

MINUTES OF COURT—MAY 31, 1930—ORDER GRANTING THIRTY DAYS TO PREPARE, SERVE AND FILE BILL OF EXCEPTIONS, ETC.

On motion of George D. Toole, Esq., attorney for the libelee George Anderson and for claimant Edward Ryan, Court ordered that the exceptions of such parties to the ruling and decision of the Court in said cases be and hereby is duly noted. Thereupon on motion of Mr. Toole, Court ordered that said parties be granted 30 days within which to prepare, serve and file a bill of exceptions herein, and bond on stay of execution was ordered fixed at $500.00, and 3 days granted to furnish the same. [20]

In the District Court of the United States, District of Montana, Butte Division.

No. 545.

UNITED STATES OF AMERICA,

Libelant,

vs.

GEORGE LEWIS (*alias* ED. DAVIS) and 1 Brunswick Balke Bar, etc.,

Libelees,

and

ED. RYAN,

Claimant.

DECREE.

This cause came on regularly to be heard on the 29th day of May, 1930, the United States of America being represented by Howard A. Johnson, Assistant United States Attorney for the District of Montana, and the claimant herein Ed. Ryan being represented by George D. Toole, his attorney, and the libelee George Lewis having been duly served with process herein but having made default, and thereupon, upon proof being submitted and upon consideration thereof.

The Court found that all the allegations in the libel of information herein are true, and that the libelant is entitled to have forfeited to it the said property in said information described.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That said 1 Brunswick Balke bar and back bar complete with mirrors, 1 Pick & Co. electric water heater, 1 Hamilton Beach electric mixer, #10M602419A, 1 National cash register, size 1086, #S297932, D. D., 1 Regulator wall clock, 1 settee, 1 card table, 1 4-ft. showcase, 3 wire back chairs, 4 cuspidors, 1 14-ft. iron floor mat, 1 cigar case top and 3 sides broken, 2 davenport ends and 1 davenport base (2 pieces), 1 davenport back, 1 floor mat, 1 back bar in 3 sections, 1 mirror frame, 2 mirrors, 11 pieces marble, 2 pieces back bar top, 2 end posts, 1 wash rack (3 sections), 2 pieces molding, 1 card table, 1 clock, 2 small posts, 3 iron chairs, 1 bar

front and ends (3 pieces), 1 large picture, 1 bar top and 4 cuspidors, now in the custody of the United States Marshal for the District of Montana be, and the same is hereby forfeited to the United States of America.

2. That the United States Marshal for the District of Montana be and he is hereby ordered to sell said personal property at public auction to the highest bidder for cash, at the Jones Transfer & Storage Company, Butte, Montana, after due notice of said sale by publication of notice thereof in one issue of the "Daily Post," Butte, Montana, at least 15 days prior to the date of said sale, and by posting copies of said notice in three public places in Butte, Mont.

3. That the libelant, the United States of America, do have and recover from the libelee George Lewis and claimant Ed. Ryan its costs and disbursements herein expended, taxed in the sum of $38.02.

Dated and entered this 10th day of June, 1930.

WITNESS, the Hon. GEORGE M. BOURQUIN, Judge of said Court, in the City of Butte, Montana.

C. R. GARLOW,
Clerk. [21]

[Title of Court and Cause.]

DRAFT OF PROPOSED BILL OF EXCEPTIONS OF EDWARD RYAN, CLAIMANT.

BE IT REMEMBERED, That this claim came on regularly for trial before the Honorable George

(Testimony of George W. Doyle.)

M. Bourquin, Judge of the District Court of the United States for the District of Montana, sitting with a jury, on the twentieth day of May, 1930, at Butte, Montana. Hon. Wellington D. Rankin, United States Attorney for the District of Montana, and Howard A. Johnson, Assistant United States Attorney, appearing for the libelant; and George D. Toole and C. S. Wagner appearing for the claimant, Edward Ryan. No appearance for George Lewis, libelee. Whereupon the following proceedings were had, orders made, objections interposed, rulings made, exceptions taken, evidence introduced, and trial upon the merits had, to wit:

TESTIMONY OF GEORGE W. DOYLE, FOR LIBELANT.

GEORGE W. DOYLE, a witness for libelant, being duly sworn, testified: [22]

Direct Examination by Mr. JOHNSON.

My name is George W. Doyle, Prohibition Agent, Civil Service. I was at the premises, No. 7 West Galena Street, in Butte, Montana, on February 3d of this year. Carroll Olson was with me at that time. We purchased a number of drinks, intoxicating liquor, moonshine. It was a soft drink parlor, operated as a saloon, mostly used for the sale of liquor. Bar about twenty-five feet long, and a back bar, mixer and water heater, and I think there was a short showcase with just a few cigarettes in that, I believe; couldn't see into that very good. I do not know exactly how long the place had been run-

(Testimony of George W. Doyle.)

ning. Its reputation was bad with reference to selling and keeping intoxicating liquor. I should say I was there about fifteen minutes. The kind of liquor I bought was moonshine whiskey.

Cross-examination by Mr. WAGNER.

The purchase was made on the third of February. Later, I made affidavit to that effect. I said I made the purchase from John Doe Eddy. I do not know who he is.

Witness excused.

TESTIMONY OF CARROLL A. OLSON, FOR LIBELANT.

CARROLL A. OLSON, a witness for libelant, being duly sworn, testified:

Direct Examination by Mr. JOHNSON.

My name is Carroll A. Olson, Prohibition Agent, Civil Service. I was with Doyle on February 3d of this year when he went to the premises, 7 West Galena, in this city. Purchased, with Agent Doyle, one round of moonshine whiskey, from a man by the name of Eddy. This man was standing behind the bar. We were in front of the bar. He got the liquor from under the bar. Set a bar bottle on the bar. There was in the premises, other than fixtures, two or three wire back chairs, small showcase used for cigars and cigarettes, near the end of the bar, between the bar and the [23] telephone.

The COURT.—I believe the answer in this case admits the articles were there.

(Testimony of Carroll A. Olson.)

Mr. JOHNSON.—Yes, your Honor, it does.

The WITNESS.—There was a cash register behind the bar. The sales for the liquor were rung up in the cash register. I can recall but one card table. There was a clock on the wall.

Witness excused.

TESTIMONY OF BEN HOLTER, FOR LIBELANT.

BEN HOLTER, a witness for libelant, being duly sworn, testified:

Direct Examination by Mr. JOHNSON.

My name is Ben Holter. I am a Federal Prohibition Agent, Civil Service. Been in the service practically ten years. I searched the premises, 7 West Galena Street, Butte, Montana, on February 24th, 1930, under authority of a search-warrant, Federal search-warrant. I found George Lewis there at the time. He is the one as defendant in this case.

The COURT.—When did you say you searched this?

Mr. HOLTER.—Feb. 24th, under search-warrant.

The COURT.—This year?

Mr. HOLTER.—This year, yes.

The COURT.—What did you find there?

Mr. HOLTER.—I found two quart bottles filled with moonshine whiskey; found a gallon jug under the bar about half full of moonshine whiskey. I

(Testimony of Ben Holter.)

found two quarts or bar bottles, fifths of gallons; one gallon jug standing on the floor under the bar filled with gin, and twenty-seven pints—pint bottles of home brew beer.

There were no internal revenue stamps on any bottles. They were all jugs and bar bottles, moonshine whiskey. It wasn't a distillery or warehouse or place of business of rectifier or wholesale liquor distillery. It was a joint. Just the usual barroom. I have a list of the property I seized, and I had [24] stored.

Q. I will read it and see if it is all here. 1 Brunswick Balke bar and back bar complete with mirrors; 1 Pick & Co. electric water heater; 1 Hamilton Beach electric mixer, No. 10M602419A; 1 National Cash register, size 1086, No. S297932 D. D.; 1 Regulator wall clock; 1 settee; 1 card table; 1 four-foot showcase; 3 wire back chairs; 4 cuspidors; 1 fourteen-foot iron floor mat; 1 cigar case, top and 3 sides broken; 2 davenport ends and 1 davenport base, 2 pieces; 1 davenport back; 1 floor mat; 1 back bar in 3 sections; 1 mirror frame; 2 mirrors; 11 pieces marble; 2 pieces back bar top; 2 end posts; 1 wash rack; 3 sections; 2 pieces moulding; 1 card table; 1 clock; 2 small posts. What are they?

A. Two small posts under the back bar, I guess where the back bar projects, to hold it.

Q. 3 iron chairs; 1 bar front and ends, 3 pieces; 1 large picture; 1 bar top; and 4 cuspidors?

A. That's what I seized. Yours are in pieces,

(Testimony of Ben Holter.)

mine are whole. (Referring to the *fact* bar, davenport, etc., were described as taken apart.)

When I went in with my warrant I observed George Lewis selling drinks to the customers at the bar. I was standing behind the bar, and the customer was in front. I observed him make a sale. He got the liquor to make the sale from behind the bar from a bar bottle. One of the bottles I have already mentioned. The furniture was all in one room—just one large room with a small partition—little old-fashioned old swinging door, old style. It was in this old-fashioned barroom that this material was. It was seized there. It was used in connection with the business of the barroom.

Cross-examination by Mr. WAGNER.

Q. Mr. Holter, before you went there on the 24th day of February, 1930, you went to United States Commissioner L. M. Van Etten, did you not, and thru him completed an application for search-warrant? A. I did not. Q. You didn't go before [25] Van Etten? A. No, sir. Q. Is this your signature on this paper that I hand you? A. Yes, but the affidavit is still there. Q. That's your signature? A. Yes. Q. This paper I hand you is entitled: "Complaint and Application for Search-warrant, Ben Holter, being first duly sworn according to law." Starts out that way? A. Not that day. Q. You swore to that before L. M. Van Etten on that date, didn't you? A. I made application for it. Q. That's your signature, and that's L. M.

(Testimony of Ben Holter.)

Van Etten's signature and seal of office? A. Yes. Q. Didn't you on that day before you went, make application for a search-warrant before L. M. Van Etten? A. Yes. Q. On this affidavit of yours? A. Yes. Q. Which is in the files in an action pending in this court, No. 2449, entitled: "United States of America, Plaintiff, *versus* George Lewis, Defendant"? A. Yes. In that application for a search-warrant I based my grounds for the warrant upon the affidavit theretofore made by one Carroll A. Olson on the 6th day of February, where he says: "Upon those premises on the 3d day of February he purchased from John Doe Eddy." That is how Van Etten, the United States Commissioner, came to issue the search-warrant. The paper you hand me in criminal case No. 2449, pending in this court, is the search-warrant that Mr. Van Etten, United States Commissioner, gave to me, and it is the paper upon which I made my return. Q. And it was under and by virtue of this warrant that you made the seizure? Mr. JOHNSON.—Objected to as incompetent, irrelevant and immaterial. The COURT.—You may answer, overruled. A. Yes. Q. Did you read the search-warrant before you made the seizure? A. Read part of it—may not have read it all. Q. I will get you to state whether this search-warrant doesn't command you to search, and that the warrant itself specifies what you shall search for? The COURT.—That shows that, itself, Counsel. Mr. WAGNER.—Yes, your Honor, I just wanted to know whether or not he knew the

(Testimony of Ben Holter.)

authority he had under the search-warrant. [26] The COURT.—Proceed. I seized some liquor there, and in my return I specified that I seized one gallon of moonshine whiskey, one and one-half gallons of gin, and twenty-seven pints of home brew. The liquor and the home brew is all destroyed, but one-half pint bottle that stood as evidence. I destroyed it right then and there. I found George Lewis in charge of the place and arrested him. I arrested him for violation of the law. Q. Violating the Prohibition Law? Mr. JOHNSON.—Objected to as incompetent, irrelevant and immaterial. The COURT.—Well, in the paper this morning, you know what the Supreme Court says. If not material, the objection will be overruled at this time. Q. He was afterwards admitted to bail and appeared in this court, was he not? A. I believe he was. I know this gentleman, Edward Ryan. I did not see him there on the day I made this seizure. Q. Why did you not save the liquor instead of destroying it? A. Why would I save it? Mr. JOHNSON.—Objected to as immaterial. The COURT.—You may answer why you didn't *save*. A. Where would I store it—sample is all? I did not gauge the liquor or home brew to see what its alcoholic content was. I can't gauge home brew. I know exactly how many gallons and how many pints I seized. The beer bottles were pints, bar bottles they were, supposedly what is commonly known as pints. Q. You made no effort at that time to ascertain whether or not there was a vol-

(Testimony of Ben Holter.)

ume of alcohol or whiskey, or volume of home brew, to see how much taxes were due and unpaid. Mr. JOHNSON.—Objected to as immaterial. The COURT.—You may answer. Q. You didn't at that time carefully gauge the contents of those different containers for the purpose of ascertaining what Internal Revenue taxes, if any, were due and had not been paid? A. Do you mean proof of spirits? Q. Answer the question. The COURT.—He didn't understand you. Q. You destroyed this liquor immediately upon its seizure? A. After filling a half-pint bottle. Q. You didn't have any Internal Revenue taxes on [27] your mind at that time, did you? Mr. JOHNSON.—Objected to as immaterial. The COURT.—You may answer, overruled. A. No. It was whiskey I poured out. I poured it out because I found this man in possession selling intoxicating liquor over the bar. That certainly was what I arrested him for. That's what I made the seizure for. Had a search-warrant to search the place as well, although I didn't need it.

Redirect Examination by Mr. JOHNSON.

That was intoxicating liquor. I said a minute ago I didn't need a search-warrant. I meant by that an open violation—man selling a drink over the bar as I walked into the place. Had a customer. Had a bottle on the bar. One had just filled his glass and set the bar bottle down, and Lewis seized the bar bottle and set it down under

(Testimony of Ben Holter.)

the bar. The place had the reputation of selling whiskey right along since it opened. I should say about three or four months now—Number 7 is. I stated a while ago I had never seen this claimant, Edward Ryan, in the place, and didn't see him there at the time. I made that statement. I have seen him in the place previous to the search. I didn't see Ryan behind the bar. He seemed to be one of the owners. Seen him there every morning—generally every morning. See him *along* the door when I was going to work. He seemed to have an interest in the place.

Mr. WAGNER.—At this time we ask to introduce in evidence in this case the files of this court in cause No. 2449, entitled: "United States of America vs. George Lewis, defendant." We first offer the affidavit for the search-warrant * * * the complaint and application for a search-warrant, search-warrant and return. The COURT.—What is the object of this? Mr. WAGNER.—The object of all this, I will state to your Honor, is that the claimant expects to show by the records in this criminal action that the proceedings were instituted under the National Prohibition Act. [28]

The COURT.—They may be considered in evidence. Mr. WAGNER.—We next offer in evidence in the same case the complaint under which the person in charge, George Lewis, was arrested, and call the Court's attention that the charge was possession of intoxicating liquor. The COURT.—Admitted as part of the same exhibit. Mr. WAG-

NER.—Wish to show further that the grand jury returned a true bill against George Lewis, charging him with a violation of the National Prohibition Act, and that the case against him under this indictment is on the calendar of this court for trial on next Friday. The COURT.—Part of the same exhibit—put them all in together.

Said documents so received in evidence are as follows, to wit:

I. AFFIDAVIT FOR SEARCH-WARRANT.

United States of America;
District of Montana,—ss.

N. B. This affidavit recites that on the 3d day of February, 1930, affiant, Carroll A. Olson, purchased from John Doe Eddy, in charge "of that certain room, place and building more particularly described as a saloon on the ground floor of a certain three-story building at number 7 West Galena Street, in the City of Butte, State of Montana—* * * a quantity of intoxicating liquor, to wit, moonshine whiskey, for which he paid the said John Doe Eddy the sum of twenty-five cents per drink, while at and within the above-described premises * * * that the said John Doe Eddy * * * were keeping stored in and about said premises a quantity of intoxicating liquor, which said intoxicating liquor was kept, possessed and sold in and about said place by them in violation of the law of the United States of America, and particularly Title II of the National Prohibition Act. Verified

before L. M. Van Etten, United States Commissioner, February 6th, 1930.

II. COMPLAINT AND APPLICATION FOR SEARCH-WARRANT. [29]

Before L. M. VAN ETTEN, United States Commissioner for the District of Montana.

United States of America,
District of Montana,—ss.

Ben Holter, being first duly sworn on oath, deposes and says: That he is a Federal Prohibition Agent; that he makes this complaint and affidavit for the purpose of procuring a search-warrant, authorizing the search of the premises herein described; that he has just and probable cause to believe, and does believe, that the intoxicating liquor is now unlawfully manufactured, kept for sale, sold, used, and given away and disposed of, in violation of Title II of the National Prohibition Act, at and within those certain premises, buildings, cellars, sub-cellars, basements, rooms, outbuildings, closets, safes, desks, drawers, containers, trunks and other receptacles, in connection therewith, in that certain room, place or building more particularly described as: a saloon on the ground floor of a certain 3 story brick building at No. 7 West Galena St., in the City of Butte, State of Montana. (Here follow reasons for applicant's belief that the intoxicating liquor laws were being violated at said premises.)

BEN HOLTER,
Applicant.

Subscribed and sworn to and filed February 24th, 1930.

III. COMPLAINT.

United States of America,
District of Montana,
Butte Division,—ss.

Before me, L. M. Van Etten, a United States Commissioner for the District of Montana, Butte Division, personally appeared Ben Holter, who being first duly sworn, deposes and says that on February 24th, 1930, at Butte, in the division and district aforesaid, George Lewis, 7 W. Galena, unlawfully and knowingly did possess intoxicating liquors in a place of business. Contrary to the form of the statute in such cases made and provided, to wit, Section 29,, Title 2, of the National Prohibition Act. Complainant further says that he [30] has reason to believe and does believe that, etc.

BEN HOLTER.

Sworn to and subscribed before L. M. Van Etten, United States Commissioner, February 24th, 1930.

IV. REPORT OF TRIAL.

N. B. Report of trial shows that on the 24th day of February, 1930, Ben Holter filed in the office of L. M. Van Etten, United States Commissioner for the District of Montana, his affidavit charging George Lewis as above. The Commissioner did find the defendant probably guilty, and did fix his recognizance to appear in the above-

entitled court on the first day of the next term, 1930, which, with the papers above referred to, filed in cause number 2449 on March 18th, 1930.

V. INDICTMENT.

Number 2449. United States District Court, District of Montana, Butte Division.

United States of America, Plaintiff, vs. George Lewis, *alias* Ed. Davis, and Ed Duplice Endorsed: A true bill. Signed by Frank Knight, Foreman of Grand Jury. Filed in open court April 25th, 1930.

N. B. Indictment in usual and standard form. First count charges that on the 3d day of February, 1930, one George Lewis * * * at and within that certain 3-story brick building occupied by the defendant as a soft drink parlor, located at 7 West Galena Street, in the City of Butte * * * did then and there wrongfully and unlawfully sell intoxicating liquor, to wit, whiskey * * * without then and there first obtaining a permit from the Commissioner of Internal Revenue so to do. (A prior conviction is attached to this count.) Second count charges unlawful possession of intoxicating liquor, to wit, whiskey, intended for use in violation of Title II of the National Prohibition Act at the time and place named in count one. (To this count are appended allegations of former convictions.) Third count same as second count except the date alleged is the 24th day of February, 1930. (To [31] this count are appended allegations of prior convictions.) Fourth count charges that on or

about the 24th day of February, 1930, George Lewis * * * at the place above designated did "Unlawfully maintain a common nuisance, that is to say, a place where intoxicating liquor was sold, possessed and kept in violation of Title II of the National Prohibition Act."

VI. MINUTES OF THE COURT.

Friday, May 23d, 1930. Sixth day May Term, 1930. Number 2449. United States vs. George Lewis, *alias* Ed. Davis. Minutes show defendant and others were duly called for arraignment, plea and trial this day, and failing to appear, on motion of District Attorney Court ordered default of defendant George Lewis and others entered, and his bond forfeited and bench warrant issued, and new bond fixed at Five Hundred Dollars.

VII. SEARCH-WARRANT.

Before L. M. VAN ETTEN, United States Commissioner for the District of Montana.

N. B. Standard form of search-warrant. Premises to be searched: "A saloon on the ground floor of a certain 3-story brick building at No. 7 West Galena Street in the City of Butte, State of Montana. Ground of issuance: purchase on the 3d day of February, 1930, from one John Doe Eddy by Carroll A. Olson: A quantity of intoxicating liquor, to wit: moonshine whiskey, for which he paid the said John Doe Eddy the sum of twenty-five cents per drink while at and within the above-described premises. And that a quantity of intoxicating

liquor was and is kept, possessed, stored, sold and used in and upon said premises in violation of Title II of the National Prohibition Act." The warrant further recites that the Commissioner found that there was probable cause to believe that intoxicating liquors were kept for sale and sold in said premises, and commands: "Now, therefore, you are hereby commanded in the name of the President of the United States, to enter said premises in the daytime, with necessary and proper [32] assistance and there diligently search for said intoxicating liquors, vessels, bottles and containers of said liquors, whether in the said premises or on the person of the said keeper or other persons present and all utensils, apparatus and materials for the manufacturing of intoxicating liquors, or for the storing and possessing of the same and all evidence of crime, of manufacturing, purchasing, possessing, selling or disposing of intoxicating liquors, as may be therein found in the form of books, receipts, recipes for manufacturing or compounding intoxicating liquors, receipts, bills of lading, notes, checks, liquor labels, letters and other such evidences, whether found in the premises or on said persons, and to report any act concerning same, as required by law of you, and to seize, secure and bring the said property with a return of your actions thereunder to the undersigned. You are further commanded that in the event you seize or take said liquors or other property or evidence under this warrant, to give a copy of this warrant together with a receipt for each and everything so seized,

itemized in detail as nearly as may be, to the person from whom it is taken by you or in whose possession it is found, or in case no person is present to leave a copy of this warrant with a receipt as aforesaid, in the place from which the said property is taken, and you are commanded to execute and return to the undersigned this warrant with your return thereon and inventory of all property taken, duly made and verified by you within ten days from date hereof. Given under my hand and seal at my office this 24th day of February, A. D. 1930.

[Commissioner's Seal] L. M. VAN ETTEN,
United States Commissioner for the District of Montana.

United States of America,
District of Montana,—ss.

RETURN.

I hereby certify that I received the within warrant on the 24th day of February, A. D. 1930, and that by virtue of said warrant and authority contained therein, I did this —— day of ————, 1930, search the premises described therein and found and seized the following described liquors, properties [33] and utensils, possessed and unlawfully used for the manufacture, sale and possession of intoxicating liquor, to wit: 1 gallon moonshine whiskey; 1½ gallons gin; 27 pints home brew beer; 1 Pick & Co. electric water heater; 1 Hamilton Beach electric mixer, #10M.602419 A.; 1 Regulator wall clock; 1 National cash register, size 1086, #S.297932, D.D.; 3 wire back chairs; 1 card table;

(Testimony of Edward Ryan.)

1 settee; 1 Brunswick Balke bar and back bar, complete with mirrors; 4 brass cuspidors; 1 14-foot iron floor mat. I hereby certify that I then and there served said warrant by giving notice of the contents thereof and gave a copy of the within warrant together with a complete inventory of the property seized to Geo. Lewis, who was present and in possession of the property seized.

I, Ben Holter, the officer by whom this warrant was executed, do swear that the above statement and inventory contains a detailed and true account of all property seized and acts done by me under authority of said warrant.

BEN HOLTER.

Subscribed and sworn to before me this 24th day of February, A. D. 1930."

TESTIMONY OF EDWARD RYAN, IN HIS OWN BEHALF.

Direct Examination by Mr. TOOLE.

My name is Edward Ryan. I am the person who interposed an answer and defense in these proceedings. I am familiar with the property described in the warrant and monition in this case and in these proceedings. I was the owner of that property on the 24th day of February, 1930. I had owned it since the previous September, and I still own it. It was situated at 7 West Galena on the 24th day of last February, when it was seized. The property consisted of 1 electric water heater; 1

(Testimony of Edward Ryan.)

mixer; 1 National cash register; Regulator wall clock; 3 chairs; 1 card table; 1 settee; 1 bar and back bar; 4 cuspidors; wire floor mat; cigar case—all the same as described in the warrant and monition—and it all belonged to me at the time it was taken out. The back bar was wired to the wall and clamped to the floor, and the front bar was clamped and screwed into the floor. The cigar case was affixed [34] to the wall and floor.

Cross-examination by Mr. JOHNSON.

I wasn't the proprietor of the place at that time, I was the owner of the property seized. I had no interest in the place. I was in and out there quite a bit. George Lewis was the proprietor of the place. He was not working for me. He was engaged in the business of running a soft drink place. I did not get any rent for the place. He paid me $50 a month for the use of my furniture. Keefe, I guess Keefe estate, owned the premises. I did not rent them. I was not about there every day, or pretty near every day. Wouldn't be around for a week or so. My business is clerk. I haven't worked for a couple of months, been in Harlowton. Prior to that time I was selling radios for Joe Marsh of South Main Street. I worked and reported most every day throughout the country selling radios. Since that time I have been in Harlorton for about two months.

Whereupon, the evidence being concluded, and the parties rested, libelant moved the Court for a directed verdict as follows:

(Testimony of Ben Ryan.)

Mr. JOHNSON.—At this time we wish to make a motion for a directed verdict; instruct the jury to return a verdict for libelant and against libelees, on the ground and for the reason that the intoxicating liquor and the personal property sought to be condemned were found and seized in the same place and building; for the reason that the presumption of law is, in the absence of stamps showing payment of internal revenue taxes, that the taxes have not been paid; and for the reason that there is ample proof of all the essential allegations of the libel of information under the pleadings.

The COURT.—Any issue of fact?

Mr. WAGNER.—We also desire to make a motion for a directed verdict in favor of the claimant, Mr. Ryan, upon the ground and for the reason the proceedings were instituted under the National Prohibition Act, Title 27, U. S. Codes. The charge made against [35] the man in possession was specifically stated in the complaint sworn to and filed against the defendant that he was unlawfully in possession of intoxicating liquor, in violation of the National Prohibition Act, Title 27, United States Codes. This was followed up by the defendant Lewis appearing before the United States Commissioner and entering a plea of not guilty to the charge, whereupon he was admitted to bail. Thereafter the Government presented the facts in its possession to the Grand Jury, and the Grand Jury returned a True Bill against Mr. Lewis for violation

of the National Prohibition Act, and this case has been set for trial on next Friday.

The COURT.—I suppose you are working on the point having possession under the Prohibition Act? Qualifying on a point of law?

Mr. WAGNER.—A point of law.

The COURT.—I tell you what I think I should do—I will hear the case argued Tuesday, and you should get the law of it before the Court. You can waive this jury and leave it to me to decide.

WHEREUPON, counsel for both parties having agreed thereto, the Court made its further order as follows:

The COURT.—Let the record show at this stage of the case, the parties having each moved for a directed verdict, thus dispensed with the jury, and left it to the judgment of the Court, and further that they agree at this time to waive the jury and leave the matter to the discretion of the Court. The case will be set for argument some time later.

Gentlemen of the Jury that relieves you. You know a jury is primarily in a case to determine questions of fact. The Court determines questions of law. This case has taken such a turn. Nothing in it but to determine a question of law. You will be excused until to-morrow morning at 10 o'clock.

Mr. TOOLE.—Will your Honor fix a time during the present term in the City of Butte?

The COURT.—A week from to-day at 9:30 o'clock. [36]

Thereafter, and on the 27th day of May, 1930, said cause came on regularly for argument. The

libelant being represented by Howard Johnson, Assistant United States Attorney, and the claimant, Edward Ryan, being represented by his counsel George D. Toole and C. S. Wagner. Whereupon oral argument was received by the Court for and on behalf of both parties, and the arguments being concluded, the Court took the matter of its decision under advisement.

Thereafter, and on the 29th day of May, 1930, the Court filed its written decision herein holding that the liquors seized are subject to tax, and that: "it is obvious there is no direct or any conflict between Section 1185, (Title 26 U. S. Codes), and Sections 34 and 39 (Title 27 U. S. Codes) of the Prohibition Act."

"The Government's case is made out. The articles were forfeited, and now condemned, and decree rendered accordingly."

Thereafter, and on the 31st day of May, 1930, on application of George D. Toole, attorney for claimant, Edward Ryan, the Court ordered that the exception of the said Edward Ryan to the ruling and decision of the Court be, and it was, duly noted, and 30 days were granted within which to prepare, serve and file a bill of exceptions herein, and bond on stay of execution was ordered fixed at $500.

Now, within the time allowed by law and the order of the Court, the claimant, Edward Ryan, presents this his proposed bill of exceptions, and prays that the same may be signed, settled and allowed as such.

Dated June 9th, 1930.

GEORGE D. TOOLE,
C. S. WAGNER,
Attorneys for Claimant, Edward Ryan. [37]

Service acknowledged and copy received this 9th day of June, 1930.

WELLINGTON D. RANKIN,
United States Attorney for the District of Montana,

HOWARD A. JOHNSON,
Assistant United States Attorney,
Attorneys for Libelant.

STIPULATION RE SETTLING BILL OF EXCEPTIONS.

It is hereby stipulated and agreed by and between the United States of America, libelant, represented by its attorneys, Wellington D. Rankin and Howard Johnson, and the claimant, Edward Ryan, represented by his attorneys, George D. Toole and C. S. Wagner, that the above and foregoing is a full, true and correct statement and transcript of the proceedings and records introduced in evidence, had and held at the trial of said cause, and proceedings subsequent thereto, and no amendments are proposed by the libelant, but such amendments are hereby waived.

Dated this 11th day of June, 1930.

WELLINGTON D. RANKIN,
HOWARD A. JOHNSON,
Attorneys for Libelant.
GEORGE D. TOOLE,
C. S. WAGNER,
Attorneys for Claimant. [38]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

In pursuance to the above and foregoing stipulation, and having examined the records as hereinabove set forth, I hereby settle and allow the same as the statement of the case and bill of exceptions of Edward Ryan, claimant in libel action No. 545.

Dated this 14th day of June, 1930.

BOURQUIN,
Judge.

Filed June 16, 1930. [39]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the claimant and appellant, Edward Ryan, in the above-entitled case, and files the following assignment of errors, upon which he will reply upon the prosecution of the appeal in the above-entitled case from the final judgment and decree

duly given and made and entered in the above-entitled case on the 10th day of June, 1920, in favor of the libelant and appellee herein and against the claimant and appellant herein forfeiting and condemning to the Government certain personal property seized at No. 7 West Galena Street, Butte, Montana, with certain intoxicating liquors, upon which taxes had not been paid, in violation of Section 1185, Title 26, U. S. Codes.

ASSIGNMENT OF ERROR No. I.

The court erred in holding and deciding: "It is obvious there is no direct or any conflict between Section 1185, *supra*, and Sections 34, 39, *supra*, of the Prohibition Act. (N. B. The Sections referred to are Section 1185, Title 26, U. S. Codes, and Sections 34 and 39, Chap. 2, Title 27, U. S. Codes . . . .). [40] The Government's case is made out, the articles were forfeited and now condemned; decrees are rendered accordingly"; for that the property described is not subject to forfeiture or condemnation either under the said section of the Internal Revenue laws or the sections of the National Prohibition Act referred to, or any other law or laws of the United States of America.

ASSIGNMENT OF ERROR No. II.

The court erred in holding and deciding the property described in the libel of information is forfeited and now condemned under the provisions of Section 1185, Title 26, U. S. Codes, for that when

the seizure of said property was made, to wit, on the 24th day of February, 1930, it was seized under a search-warrant issued by L. M. Van Etten, a United States Commissioner for the District of Montana, Butte Division, to Ben Holter, a National Prohibition Agent, acting as an officer of the court, and the libelee, George Lewis, was arrested in connection with said seizure for the unlawful possession of intoxicating liquor in violation of the National Prohibition Act, and thereafter an indictment charging the said George Lewis with the unlawful sale of intoxicating liquors; the unlawful possession of intoxicating liquors, and the maintenance of a common nuisance in connection therewith at said 7 West Galena Street, Butte, Montana, in violation of Chapter 2, Title 27, U. S. Codes, based upon his arrest as aforesaid, was returned by the grand jury, and the said George Lewis was held under bail thereunder in that certain criminal action pending in the above-entitled court No. 2449, entitled: "United States of America, Plaintiff, vs. George Lewis et al., Defendants," and the said cause was set for trial in the above-entitled court on the 23d day of May, 1930, and said cause being ready for trial was called for trial, and the said George Lewis, defendant, failing to appear, his bail was forfeited and a bench-warrant issued for his apprehension, all of which appears by the records [41] in said criminal cause received in evidence at the trial of this libel action, by reason whereof, the libelant herein elected unconditionally to proceed under the National Prohibition Act, and

not under any Internal Revenue statute, particularly not under Section 1185, Title 26, U. S. Codes.

ASSIGNMENT OF ERROR No. III.

The judgment and decree is contrary to law, for that the property condemned and forfeited is not the subject of seizure, forfeiture or condemnation under Section 1185, Title 26, U. S. Codes, or of the National Prohibition Act, or under any other law or laws.

ASSIGNMENT OF ERROR No. IV.

The judgment is contrary to law, for that the property seized, forfeited and condemned is not described in the search-warrant under which the seizure was made, as appears by the terms of said search-warrant and the return of the seizing officer thereon, introduced in evidence in this case.

WHEREFORE claimant and appellant prays that the said judgment and decree be reversed, with directions to the District Court of the District of Montana, Butte Division, to enter judgment and decree in favor of claimant and appellant in accordance with the prayer of his answer and defense to the libel of information herein.

Dated this 17th day of June, 1930.

GEORGE D. TOOLE,
C. S. WAGNER,
Attorneys for Claimant and Appellant, Edward Ryan.

Filed June 17th, 1930. [42]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable GEORGE M. BOURQUIN, District Judge:

The above-named claimant, Edward Ryan, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 10th day of June, 1930, forfeiting and condemning specified articles of personal property under Section 1185, Title 26, U. S. Codes, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which the decree was made, duly authenticated, be sent to the Circuit Court of Appeals for the Ninth Circuit under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

Dated this 20th day of June, 1930.

GEORGE D. TOOLE,
C. S. WAGNER,
Attorneys for Claimant Edward Ryan. [43]

ORDER ALLOWING APPEAL.

Now, June 20, 1930, the claimant, Edward Ryan, having by his counsel heretofore, on the 31st day of May, 1930, applied to this Court for a supersedeas pending appeal, and the Court having fixed bonds for said purpose in the sum of $500, the foregoing petition for appeal is hereby allowed, and a good and sufficient bond in due form of law having been furnished and approved, the Clerk is hereby directed to stay the mandate of the decree made, rendered and entered herein pending the appeal of the said Edward Ryan, claimant, and until the further order of the Court.

BOURQUIN,
Judge.

Filed June 24th, 1930. [44]

[Title of Court and Cause—No. 545.]

BOND ON APPEAL.

Approved and filed June 24, 1930. [45]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
District of Montana,
Butte Division,—ss.

To the Above-named Libelant, and to WELLINGTON D. RANKIN, United States Attorney for the District of Montana, and HOWARD A. JOHNSON, Assistant United States Attorney, Attorneys for Libelant:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, on the 19th day of July, A. D. 1930, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States for the District of Montana, Butte Division, from a final decree signed, filed and entered on the 10th day of June, 1930, in that certain libel action No. 545, wherein the United States of America is libelant, and George Lewis (*alias* Ed. Davis), and one Brunswick bar and back bar, complete with mirrors, etc., are libelees, and Edward Ryan is claimant, and you are appellee, to show cause, if any there be, why the [48] decree rendered against the said appellant, Edward Ryan, claimant, as in said order allowing appeal mentioned, should not be corrected,

and why justice should not be done to the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, United States District Judge for the District of Montana, Butte Division, this the 24th day of June, A. D. 1930, and of the Independence of the United States of America the one hundred and fifty-fourth year.

BOURQUIN,
United States District Judge for the District of Montana.

Due and legal service of the above and foregoing citation is hereby acknowledged and copy received this 26th day of June, 1930, together with copy of assignment of errors.

WELLINGTON D. RANKIN,
United States Attorney for the District of Montana.
HOWARD A. JOHNSON,
Assistant United States Attorney,
Attorneys for Libelant and Appellee.

Filed June 26th, 1930. [49]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of the Above-entitled Court.

Please prepare transcript on appeal in the above-entitled case from the judgment duly given and made and entered on the 10th day of June, 1930, in favor of the libelant and against the claimant Edward

Ryan, and therein designate the parties on appeal as follows: Edward Ryan, Appellant, vs. United States of America, Appellee.

Therein include in the order named the records and files in the above-entitled case, and include also the parts of the records and files herein designated in criminal cause number 2449, United States of America, Plaintiff, vs. George Lewis, (*alias* Ed Davis), et al., Defendants. For brevity the records in each case will be referred to by number.

No. 545. 1, libel of information; 2, publication of notice of seizure; 3, publisher's affidavit of publication; 4, marshal's return of property seized; 5, answer and defense of Edward Ryan, claimant; 6, minutes of the trial, May 20th, 1930.

No. 2449. 7, minutes of the court of May 27th, 1930. No. 545, 8, minutes of the court May 29th, 1930; 9, opinion and decision of the court filed May 29th, 1930; 10, minutes of the court May [50] 31st, 1930; 11, the judgment and decree; 12, the bill of exceptions; 13, the assignment of errors; 14, petition for appeal and order allowing same; 15, the bond on appeal; 16, the citation, by copy, (attach and forward with the transcript the original citation); 17, a copy of this praecipe.

Append your certificate in due form of law, and state therein the cost of this transcript, and that the same has been paid by Edward Ryan, the appellant.

Dated this 26th day of June, 1930.

GEORGE D. TOOLE,
C. S. WAGNER,
Attorneys for Appellant.

Service of the foregoing praecipe acknowledged and copy received this 26th day of June, 1930.

WELLINGTON D. RANKIN,
United States Attorney for the District of Montana,

By HOWARD A. JOHNSON,
Assistant United States Attorney,
Attorneys for Appellee.

Filed June 26th, 1930. [51]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, C. R. Garlow, Clerk of the District Court of the United States for the District of Montana, hereby certify the foregoing transcript, consisting of 52 pages, contains a full, true and correct copy of the papers, records, proceedings had and orders entered in the cause entitled, "United States of America, Libelant, *versus* George Lewis, *alias* Ed Davis, and 1 Brunswick Bar and Back Bar, etc., Libelees; Edward Ryan, Claimant; No. 545 of the records and files of the District Court of the United States for the District of Montana, Butte Division, as required by the praecipe for transcript of record and on file in said cause, as appears by copy of said praecipe incorporated herein.

I do further certify that the original citation, with acknowledgment of service, together with ser-

vice of a *copy the* assignment of errors, is attached hereto.

I further certify that the costs of the foregoing transcript of the record, amounting to the sum of $7.40, have been paid in full by the appellant, Edward Ryan.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said court, at Butte, Montana, this the 27th day of June, 1930, in the year of our Independence, the one hundred fifty-fourth.

[Seal]

C. R. GARLOW,
Clerk.

By L. R. Polglase,
Deputy. [52]

[Endorsed]: No. 6184. United States Circuit Court of Appeals for the Ninth Circuit. Edward Ryan, Claimant of One Brunswick Bar, Complete With Mirrors, etc., Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed July 1, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

57 United States Circuit Court of Appeals for the Ninth Circuit

EDWARD RYAN, CLAIMANT OF ONE BRUNSWICK BAR, Complete with Mirrors, etc., appellant
vs.
UNITED STATES OF AMERICA, APPELLEE
No. 6184

UPON APPEAL from the District Court of the United States for the District of Montana

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

58 At a stated term, to wit, the October term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the tenth day of November, in the year of our Lord one thousand nine hundred and thirty.

Present: Honorable Frank H. Rudkin, circuit judge, presiding; honorable Curtis D. Wilbur, circuit judge; honorable William P. James, district judge.

EDWARD RYAN, CLAIMANT OF ONE BRUNSWICK BAR, Complete with Mirrors, etc., appellant
vs.
UNITED STATES OF AMERICA, APPELLEE.
No. 6184

Order of submission

Ordered, appeal in above cause argued by Mr. C. S. Wagner, counsel for the appellant, and by Mr. Wellington D. Rankin, United States attorney, counsel for the appellee, and submitted to the court for consideration and decision.

59 At a stated term, to wit, the October term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the seventeenth day of November, in the year of our Lord, one thousand nine hundred and thirty.

Present: Honorable Frank H. Rudkin, circuit judge, presiding; Honorable Curtis D. Wilbur, circuit judge; Honorable Frank H. Kerrigan, district judge.

EDWARD RYAN, CLAIMANT OF ONE BRUNSWICK BAR, COMplete with Mirrors, etc., appellant
vs.
UNITED STATES OF AMERICA, APPELLEE
No. 6184

Order directing filing of opinion and filing and recording of decree

By direction of the court, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a decree be filed and recorded in the minutes of this court in above cause in accordance with the opinion filed.

60 United States Circuit Court of Appeals for the Ninth Circuit

EDWARD RYAN, CLAIMANT OF ONE BRUNSWICK BAR, COMplete with Mirrors, etc., appellant,
vs.
UNITED STATES OF AMERICA, APPELLEE
No. 6184

UPON APPEAL from the District Court of the United States for the District of Montana

Before RUDKIN and WILBUR, Circuit Judges, and JAMES, District Judge

RUDKIN, Circuit Judge:

This was a proceeding by information to forfeit bar fixtures and other articles of personal property found in a soft-drink parlor where intoxicating liquors, in respect whereof a tax was then and there due and unpaid, were kept and sold. The proceedings were instituted under section 3453 of the Revised Statutes (26 U. S. C. A. 1185), which provides as follows:

"All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited
61 to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such

forfeitures shall be in the nature of a proceeding in rem in the district court of the United States for the district where such seizure is made."

This section, enacted in 1866 (14 Stat. 111), was amendatory of section 48 of the act of June 30, 1864 (13 Stat. 240). By the earlier act the forfeiture, save as to goods, wares, merchandise, articles, or objects on which taxes were imposed, and raw materials, was limited to:

"* * * tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles on which duties are imposed, as aforesaid, and intended to be used by them in the fraudulent manufacture of such raw materials, shall be found * * *."

It will be observed that by the amendment, or in the revision, the limitation in regard to the intended use of the tools, implements, instruments and personal property was left out.

Although the amended section has been in effect for upwards of sixty years, the provision in regard to the forfeiture of personal property has never been construed by the Supreme Court or by any Circuit Court of Appeals, so far as we are advised, and the decisions of the Circuit and District courts, both early and late, are in hopeless conflict. Thus in United States v. Thirty-three Barrels of Spirits (28 Fed. Cas. No. 16470), decided in 1868, Judge Lowell said:

"The new statute amends the phraseology of this section in several other particulars, without, perhaps, much variation of the meaning, but omits altogether the qualifications of intended use of the tools, implements, instruments, and personal property and upon a literal interpretation might seem to subject to seizure and forfeiture all goods and chattels and other things coming within the very general description of personal property, to whomsoever they may belong, if found in the same building, including outbuildings, yard, etc., with the offending goods. It is impossible to believe that any such sweeping condemnation is intended to be passed, found upon mere proximity in place, upon the goods of all persons, innocent and guilty. In its application to a city or other busy place, where the same building is divided into numerous tenements, shops, offices, counting-houses, and warerooms, all being often found under one roof, and each occupied by a different tenant, the operation of such a law would work the most enormous and unheard of injustice. To take a single example: the money in the vaults of a bank might be forfeited for the fault of some petty trader in the attic of the banking-house."

The court then applied the maxim noscitur a sociis and restricted the forfeiture to tools, implements, instruments and personal property connected with the illegal business and found within the building, yard, or inclosure where the business was carried on.

In United States v. Sixteen Barrels of Distilled Spirits (27 Fed. Cas. No. 16300), decided in 1879, Judge Choate refused to follow

the decision of Judge Lowell, but himself softened the rigor of the statute by confining the term place within narrow limits, thus permitting it to control over the more general language, building, yard, or inclosure. Judge Choate followed earlier decisions in the same court, which seem to sustain his view, except, perhaps as to the meaning of the term "place" as employed in the statute. A reference to the other cases does not aid us.

The cases to which we have referred were all decided between 1868 and 1879, and for the next half century, so far as we are advised, there is no reported case on the subject under consideration. As said by the court in In re Hurley (37 F. (2d) 397, 401), decided during the present year:

"Since 1879, so far as disclosed by reported cases, the Department of Internal Revenue of the United States has not availed itself of this statute to seize personal property other than contraband goods, except in the case of a distillery or manufactory of some kind."

In United States v. One Ice Box (37 F. (2d) 120), the
63 court declared a forfeiture under facts very similar to those involved in this case, holding that all personal property found in a place where contraband articles intended to be sold or removed in fraud of the internal revenue laws, or to avoid payment of taxes, are kept, is subject to forfeiture under the section in question. On the other hand, in In re Hurley, supra, a contrary conclusion was reached, the court saying:

"I believe that the intent of the legislation in the matter of the seizure of other personal property which was clearly expressed in the statute in the form in which it was passed in 1864, was not changed by the taking out of certain words by the amendment of 1866. These words were taken out for a different purpose. I believe that the statute in its present form, when submitted to all the tests of statutory construction, still means that other personal property may be seized only in places where the contraband articles are being fabricated. I do not believe that it was ever intended that the finding of half a dozen bottles of non-tax paid liquor would work a confiscation of the entire contents of a large building used as a rooming house, or of the entire contents of a drug store or a department store in which they might be found or authorize the seizure and removal and forfeiture of all of the furniture and fittings of a great hotel."

A reference to the decided cases clearly demonstrates that the question with which we are now confronted is by no means free from doubt or difficulty, but in view of the apparent attitude of the department charged with the administration of the revenue laws during the past fifty years, and in view of the inequality, if not injustice, that would necessarily result from a strict enforcement of the forfeiture provisions of the statute, as construed by the court below, we feel constrained to hold that such provisions should be limited or restricted to places where the contraband articles are

manufactured as in C. I. T. Corporation v. United States, decided by this court November 10, 1930.

The judgment of the court below is therefore reversed.

(Endorsed:) Opinion. Filed Nov 17, 1930. Paul P. O'Brien, clerk.

64 United States Circuit Court of Appeals for the Ninth Circuit.

EDWARD RYAN, CLAIMANT OF ONE BRUNSWICK BAR, Complete with Mirrors, etc., appellant
vs.
UNITED STATES OF AMERICA, APPELLEE
No. 6184

Decree

APPEAL from the District Court of the United States for the District of Montana

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Montana, and was duly submitted.

On consideration whereof it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause be, and hereby is, reversed.

(Endorsed:) Decree. Filed and entered November 17, 1930. Paul P. O'Brien, clerk.

65 United States Circuit Court of Appeals for the Ninth Circuit

EDWARD RYAN, CLAIMANT OF ONE BRUNSWICK BAR, ETC., appellant
vs.
UNITED STATES OF AMERICA, APPELLEE
No. 6184
and
IN THE MATTER OF THE PETITION OF GEORGE ANDERSON FOR the Return of One-half Dozen 16-oz. Glasses, etc., and George Anderson, appellant
vs.
UNITED STATES OF AMERICA, APPELLEE
No. 6185

Application for stay of mandate

[Postal Telegraph]

578 43 GOVT. Helena, Mont. 17 530P.

1931 FEB 17 PM 5 08

PAUL P. O'BRIEN,
Clerk, Circuit Court of Appeals.

Wire just received from Attorney General states sixty days' extension of time granted by Supreme Court for filing certiorari in Ryan

and Anderson cases, numbers 6184 and 6185. Request order staying issuance of mandate both cases accordingly.

HOWARD A. JOHNSON,
Assistant U. S. Attorney.

Order staying issuance of mandate

Upon application of Mr. Howard A. Johnson, assistant United States attorney, counsel for the appellee in each of the above causes, and good cause therefor appearing, it is ordered that the mandate of this court in each of the above causes be, and hereby is, stayed to and including April 18, 1931.

FRANK H. RUDKIN,
United States Circuit Judge.

Dated, San Francisco, California, February 18, 1931.

(Endorsed:) Application for and order staying issuance of mandate. Filed February 18, 1931. Paul P. O'Brien, clerk.

66 United States Circuit Court of Appeals for the Ninth Circuit

EDWARD RYAN, CLAIMANT OF ONE BRUNSWICK BAR, COMplete with Mirrors, etc., appellant
vs.
UNITED STATES OF AMERICA, APPELLEE. } No. 6184

Certificate of clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under rule 38 of the Revised Rules of the Supreme Court of the United States

I, Paul P. O'Brien, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-five (65) pages, numbered from and including 1 to and including 65, to be a full, true, and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United State Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this eighteenth day of February A. D. 1931.

[SEAL.]

PAUL P. O'BRIEN, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

v.

EDWARD RYAN, CLAIMANT OF ONE BRUNSWICK BAR, ETC.

UNITED STATES OF AMERICA

v.

GEORGE ANDERSON

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRITS OF CERTIORARI

On consideration of the motion of counsel for petitioner in the above-entitled cases, and good cause therefor having been shown, it is now ordered that the time within which a petition for writs of certiorari in the above-entitled causes may be filed herein be, and the same is hereby, extended for a period of sixty days from this date.

Dated this 16th day of February, 1931.

GEO. SUTHERLAND,
Associate Justice of the
Supreme Court of the United States.

77460—31

U. S. GOVERNMENT PRINTING OFFICE: 1931

Supreme Court of the United States

Order allowing certiorari

Filed May 25, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

In the

Supreme Court of the United States

October Term, 1960

No. [redacted]

UNITED STATES OF AMERICA, PETITIONER,

v.

NEW AND REAL, CLAIMANT OF ONE DIAMOND RING, ETC.,
CONSISTING WITH MOTION, ETC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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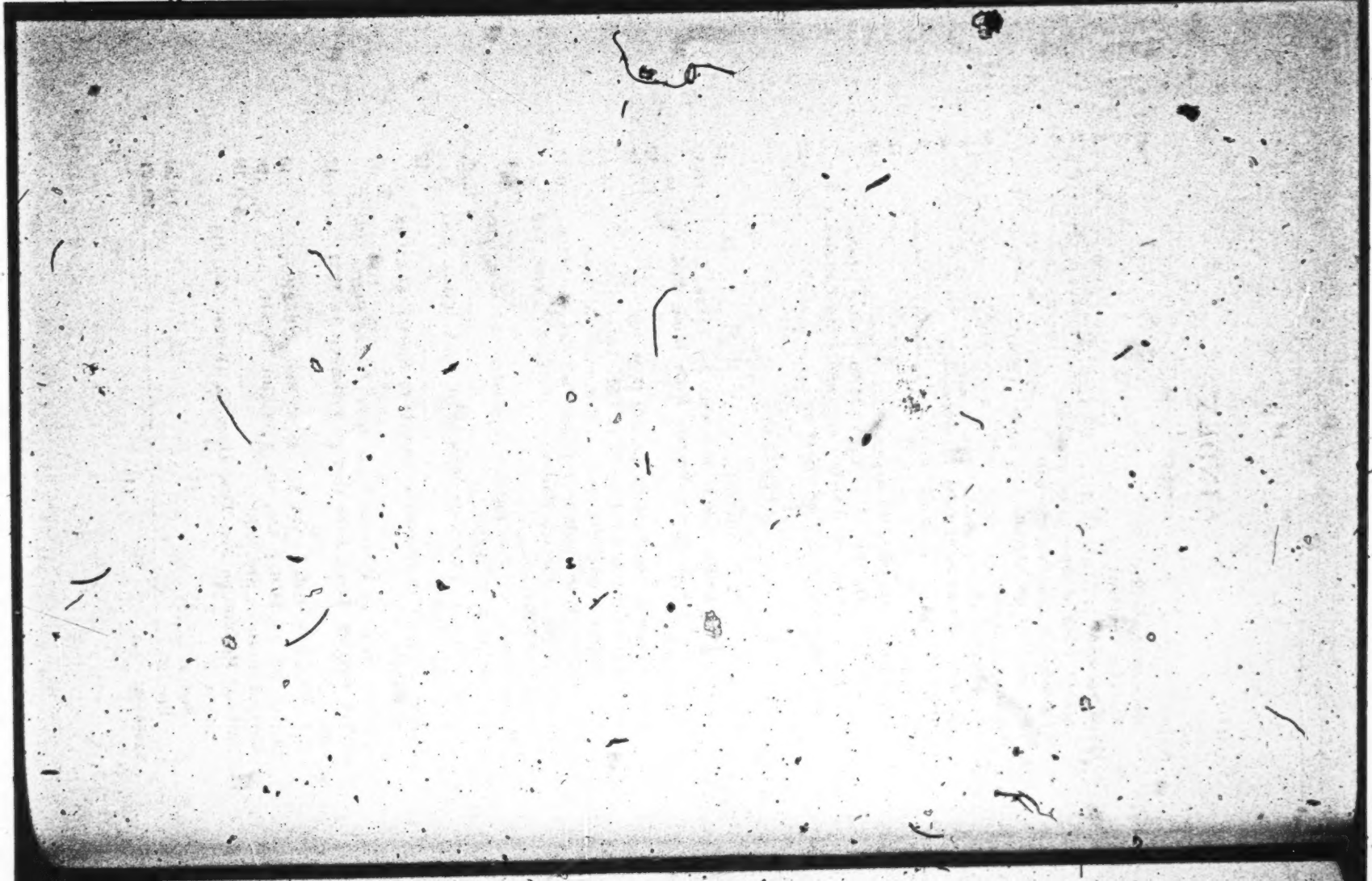

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD RYAN, CLAIMANT OF ONE BRUNSWICK BAR, COMPLETE WITH MIRRORS, ETC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Ninth Circuit, entered November 17, 1930 (R. 61), reversing a decree of the District Court for the District of Montana (R. 22–23) declaring a forfeiture of certain property under Section 3453 of the Revised Statutes.

QUESTION PRESENTED

Whether Section 3453 of the Revised Statutes provides for the forfeiture of all personal property found in a place where articles subject to tax are possessed for the purpose of being *sold or removed* in fraud of the internal revenue laws or with design to avoid payment of such tax, or whether that statute provides for the forfeiture of such personal property only which is found in a place where articles subject to tax are *manufactured* for such fraudulent purpose or with design to avoid payment of tax.

STATUTES INVOLVED

These are set forth in Appendix A, pp. 18–21, *infra*.

STATEMENT

On March 21, 1930, a libel was filed by the United States in the District Court praying the forfeiture of a bar, back bar, and other saloon furnishings and equipment, alleged to have been seized by Federal prohibition agents in a soft-drink parlor operated by one George Lewis in Butte, Montana, and then held by the Federal Prohibition Administrator for that district. (R. 1–3.) The libel averred that at the time of the seizure—

> the defendant George Lewis * * * within the premises hereinabove described, did then and there * * * have in his possession and * * * control certain goods, * * *

to wit, whiskey, beer and gin, a more particular description of which is to your informant unknown, * * * which said intoxicating liquors were goods and commodities for and in respect whereof a tax was then and there due and unpaid, which said intoxicating liquors were then and there in the possession, custody and control of said defendant for the purpose of being sold or removed by him in fraud of the internal revenue laws of the United States of America and with the design to avoid the payment of said taxes * * *.

Ryan, the respondent here, appeared as claimant and filed an answer in which he asserted that the property libeled had been seized upon a search warrant issued under the National Prohibition Act; that in the execution of said warrant certain whiskey, beer, and gin, as well as the containers thereof, had been seized as authorized by the National Prohibition Act; that in addition thereto the officers executing said warrant, acting in excess of the powers conferred upon them by the National Prohibition Act and by the warrant, seized the property described in the libel; that none of the libeled property was designed for the manufacture of intoxicating liquor or intended for use in violating the National Prohibition Act, and that at the time of its seizure the claimant was, and still is, the owner of such property and entitled to the immediate possession thereof. The answer denied that

any part of the libeled property was subject to forfeiture for any violation of the internal revenue laws. (R. 9–15.)

Issue was joined on these pleadings. The evidence clearly established that on February 24, 1930, the date of the seizure, tax-unpaid liquor was held for sale and was being sold by the libellee, George Lewis, on the premises where the libeled property was seized. The libeled property was seized in the room occupied by Lewis for the sale of the liquor and was used by Lewis as ancillary to such sale. (R. 24–26, 27–32.)

The claimant introduced in evidence the record of criminal proceedings against George Lewis showing that the latter had been indicted for the possession of intoxicating liquor and the maintenance of a common nuisance in violation of the National Prohibition Act on the premises in question on February 24, 1930, when the property libeled was seized, and that upon being called for arraignment, Lewis had failed to appear. (R. 32, 36–37.) The claimant testified that he was the owner of the libeled property at the time it was seized; that he was not the owner of the premises and had no interest therein; and that Lewis had rented the furniture from the witness. (R. 40–41.)

Both sides having moved for a directed verdict at the close of all the testimony, counsel, at the suggestion of the court, entered into an agreement pursuant to which the jury was dismissed and the issues left for the determination of the court. (R.

42–43.) The District Court held (1) that Section 3453 of the Revised Statutes provides for the forfeiture of all personal property in any building or inclosure where articles subject to an internal revenue tax are possessed for the purpose of being sold with design to avoid payment of the tax, and (2) that there was no such direct conflict between Section 3453 of the Revised Statutes and Sections 22 and 25 of the National Prohibition Act as to effect an implied repeal of Section 3453. (R. 18–20.) A decree for the libelant was accordingly entered. (R. 22–23.)

Upon appeal the decree was reversed by the Circuit Court of Appeals (R. 58–61) on the sole ground that the District Court erred in construing Section 3453 as providing for the forfeiture of all personal property found in a place where articles subject to tax are possessed for the purpose of being *sold* with design to avoid payment of such tax, the appellate court holding that, except for articles subject to tax and raw materials intended to be manufactured into such articles, the only personal property which is forfeitable under Section 3453 is that found in a place where articles subject to tax are *manufactured*.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that Section 3453 of the Revised Statutes does not provide for a forfeiture of personal property, other than articles subject to tax, which is found in a

place where articles subject to tax are possessed for the purpose of being sold or removed in fraud of the internal revenue laws, or with design to avoid payment of such tax.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals for the Ninth Circuit in this case is in direct conflict with that rendered on April 6, 1931, by the Circuit Court of Appeals for the Second Circuit in *United States* v. *10 Bottles of Scotch Whiskey, etc.*, the opinion in which case is set out in full in Appendix B, pp. 22-27, *infra*. A large number of suits have been instituted by the Government under Section 3453 to forfeit the furnishings and equipment of saloons, cabarets, and other places where intoxicating liquors have been kept *for sale and sold* with design to evade the payment of the taxes thereon. In some of these cases the libels have been sustained and forfeiture decreed by the district courts; in others, the district courts have held that the only personal property, other than the taxed articles themselves, which is forfeitable under Section 3453 is that found in places where such taxed articles are *manufactured*. This divergence of decision has now extended to the circuit courts of appeals. An authoritative ruling by this Court is necessary to settle the conflict of decisions thus prevailing in the lower Federal courts and to enable the Government to determine its future action in the ad-

ministration of the internal revenue laws and the National Prohibition Act.

Wherefore it is respectfully submitted that this petition for certiorari to review the decree of the Circuit Court of Appeals in the above-entitled cause should be granted.

THOMAS D. THACHER,
Solicitor General.

APRIL, 1931.

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BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 18) has not been reported. The opinion of the Circuit Court of Appeals (R. 58–61) is reported in 44 F. (2d) 951.

JURISDICTION

The decree of the Circuit Court of Appeals was entered November 17, 1930. (R. 61.) On February 16, 1931, the time for filing a petition for certiorari was, upon application of the Government, extended for a period of sixty days from that date. The jurisdiction of this Court to issue the writ applied for is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATUTES INVOLVED, ETC.

A statement of the question presented, statutes involved, and assignment of error relied upon, as well as a statement of the case, will be found in the petition.

ARGUMENT

THE CIRCUIT COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF SECTION 3453 OF THE REVISED STATUTES

Section 3453 of the Revised Statutes (*infra*, p. 18) provides for the forfeiture of three classes of property, viz:

(1) "*All* goods, wares, merchandise, *articles,* or objects, *on which taxes are imposed,* which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes";

(2) "all *raw materials* found in the possession of any person intending to manufacture the same into *articles of a kind subject to tax* for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax"; and

(3) "all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where *such articles* or *raw materials* are found." (Italics ours.)

The Circuit Court of Appeals treated the words "such articles," contained in the third clause, as referring only to articles mentioned in the second clause, that is, those *manufactured* from raw materials, whereas the District Court treated the words "such articles" as referring also to the articles mentioned in the first clause, *i. e.,* taxed articles as being found in possession of a person for the purpose of being *sold or removed* in fraud of the internal revenue laws. The Circuit Court of Appeals accordingly held that since the personal property sought to be forfeited in the instant case was not found in a place where articles subject to tax were manufactured from raw materials, such prop-

erty was not forfeitable. We submit that this construction of the statute is erroneous.

Section 3453 was a reenactment of the provisions of Section 9 of the Act of July 13, 1866, c. 184, 14 Stat. 98, 111, amending Section 48 of the Act of June 30, 1864, c. 173, 13 Stat. 223, 240. In the Act of 1864 the first two of the above classes of forfeitable property were defined in substantially the same language as in Section 3453. The third class was described in that Act as follows:

> * * * all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure where such articles *on which duties are imposed, as aforesaid, and intended to be used by them in the fraudulent manufacture of such raw materials,* shall be found. * * * (Italics ours.)

The amendment of 1866 omitted the italicized words and inserted the words "or raw materials" immediately following the words "such articles," so that the description of this class of property conformed to that subsequently given it in Section 3453, except that the final words "shall be found" were carried into the revision as "are found." Commenting upon the effect of this legislation, District Judge Blatchford in *United States* v. *Quantity of Tobacco*, Fed. Cas. No. 16106, decided in 1872, said (p. 654):

> A reading of the 48th section, giving the usual accepted meaning to the words found therein, seems to me to lead conclusively to

the view that congress intended to forfeit taxable articles when held, especially by their manufacturer, *for the purpose of being sold or removed in fraud of the revenue laws*, or with design to avoid the payment of the taxes which would accrue thereon by reason of such sale or removal; and also to forfeit all raw materials when held by a person intending to manufacture them into taxable articles for the purpose of fraudulently selling such articles, or with design to evade the payment of the taxes which would accrue thereon when sold or removed, and also to forfeit *all personal property found in the place where any such articles*, or any such raw materials, are found; and that possession, with the specified purpose, design or intent, is all that is necessary to work the forfeiture. * * *

* * * The section was amended by the act of July 13, 1866, to read as before recited, *being made more stringent as respected personal property, so as to cover all personal property found in the same place with either the articles or the raw materials, and without reference to the intended use of such personal property.* (Italics ours.)

Similar views were expressed by the same judge in *Quantity of Distilled Spirits*, Fed. Cas. No. 11494, decided in 1868. With reference to a forfeiture sought under Section 48, as amended by the Act of 1866, he there said (p. 1160):

If these spirits, at the time of this seizure, on the 14th day of February, 1868, were

> found on the place, in the possession or custody, or within the control, of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid the payment of the tax, then, not only are the spirits forfeitable under this section, but also all tools, implements, instruments, and personal property whatsoever, in the place or building where the spirits were found.

And again (p. 111):

> If there were any spirits there, which these parties purposed to sell or remove in fraud of the law, or with design to avoid the payment of the tax, the spirits, and everything in the establishment, are forfeited.

See also *United States* v. *Eighteen Barrels High Wines,* Fed. Cas. No. 15033; *United States* v. *Thirty-six Barrels of High Wines,* Fed. Cas. No. 16468 (p. 70). Cf. *United States* v. *Thirty-three Barrels of Spirits,* Fed. Cas. No. 16470 (1868).

In *United States* v. *Sixteen Barrels of Distilled Spirits,* Fed. Cas. No. 16300 (1879), District Judge Choate held the statute, then Section 3453 of the Revised Statutes, to have the effect earlier given it by Judge Blatchford in the cases above cited. In that case it was said:

> The argument of the claimant is that the words "articles or raw materials" do not refer to the words "all goods, wares, mer-

chandise, articles or objects," but only to the words "all raw materials found in the possession of any person intending to manufacture the same into articles." But the proper antecedent of the words "such articles" is the words "all goods, wares, merchandize, articles and objects." These things before enumerated are here described under the general term "articles." There is no other sensible construction of the language nor anything else to which the term "such articles" can be held to refer with any regard to the grammatical meaning of the words. The words refer to something before mentioned in the section and are called articles as being "found" in the place. They can not refer, therefore, to "articles" which might be in the future manufactured out of the raw materials found in the place, but which are not now found there. "Such articles" can not, therefore, mean the articles which it is intended to manufacture out of the raw materials. The construction given to the section in this respect is that which it has uniformly received in this court and in the circuit court in this circuit.

See also *United States* v. *Quantity of Rags*, Fed. Cas. No. 16103.

In *United States* v. *One Ice-box*, 37 F. (2d) 120 (N. D. Ill.), the Government sought forfeiture under Section 3453 of an ice box, bar, and other equipment of a saloon, on the ground that intoxicating liquors had there been possessed for sale

with intent to avoid payment of the tax thereon. The court decreed such forfeiture, and in its opinion said (pp. 122, 123):

> An analysis of the section discloses its comprehensiveness. It provides for the seizure and forfeiture under the conditions there stated of (1) the contraband goods; (2) all raw materials intended to be manufactured into contraband goods with intent to sell them in fraud of the revenue laws; and (3) "all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure where such articles or raw materials are found."
>
> Naturally and grammatically the words "articles" and "raw materials," respectively, as used in the third classification, refer to the contraband articles and contraband raw materials referred to in the first and second classifications. The plain and natural meaning of the language used is that all personal property in the same place where the contraband articles are found is the subject of forfeiture.
>
> * * * * *

Three days after the foregoing case was decided it was held in *In re Hurley*, 37 F. (2d) 397 (W. D. N. Y.), that Section 3453 permitted the forfeiture only of personal property (other than that upon which taxes are imposed) which is found in a place or building where *manufacturing* takes place.

In *United States* v. *Ten Bottles of Scotch Whiskey*, decided April 6, 1931 (p. 22, *infra*), the Circuit Court of Appeals for the Second Circuit, after referring to most of the cases discussed in this brief, held that the forfeiture provided for by the third clause of Section 3453 was not confined to personal property found in a place where taxable articles were manufactured, but extended to property found in places where such articles were sold or removed. In this regard the court said:

> It appears to us that to construe the clause in question as limited to cases of manufacture disregards the words "such articles" in the clause "in the place or building, or within any yard or inclosure where such articles or raw materials are found." Except for the earlier form of this provision in the Act of 1864 there seems to be no room for doubt. The section begins by condemning all "articles" on which taxes are imposed. It extends this by the next sentence to "raw materials" intended for the manufacture of "articles of a kind subject to tax," and concludes by including the tools, etc., in the place "where such articles or raw materials" may be. The apparent purpose was to cover the associates of manufactured articles as well as of raw materials; nor is there any antecedent reason to impute any difference. * * *
>
> * * * Hence we hold that property is confiscable when found in the same place or building as manufactured articles subject to tax.

The court declared, however, that the chattels must be in a part of the building occupied by the possessor of the illicit liquor, and, adding that such chattels must be "in a part associated in use with that where the liquors are possessed," it held the libel defective for failure to allege these facts with sufficient clarity. In reversing the decree of forfeiture with leave to the libelant to plead over, it reserved decision as to the necessity for showing that the chattels sought to be forfeited were in the custody of the possessor of the liquor, and, if so, that they were being used as ancillary to the unlawful possession.

In the instant case it is clear that the property described in the libel was found in that part of the building which was occupied and used by the possessor of the liquor for the illegal sale thereof, and that it was in the custody of such possessor and used by him as ancillary to the unlawful business. (R. 24–25, 26–32.) The only question involving the construction of Section 3453 which is presented, therefore, is whether that statute authorizes the forfeiture of property found in a place where taxable articles are sold in fraud of the internal revenue laws. The holding of the court below that the statute is not to be so construed is directly in conflict with that of the Circuit Court of Appeals for the Second Circuit in the *Ten Bottles of Scotch Whiskey case*, and other cases herein cited, and is supported only by the decision in *In re Hurley, supra*. We submit that the decision of the court below in the instant case is erroneous.

The respondent also contended before the Circuit Court of Appeals (1) that the prosecution of Lewis, the proprietor of the saloon, under the National Prohibition Act barred the forfeiture of the libeled property under Section 3453, and (2) that Section 3453 has been impliedly repealed because in direct conflict with Sections 22 and 25, Title II, of the National Prohibition Act. These contentions were not passed upon by the Circuit Court of Appeals. We submit that they are clearly without merit. See *Various Items of Personal Property* v. *United States*, No. 114, October Term, 1930, decided February 24, 1931; *United States* v. *One Ford Coupe*, 272 U. S. 321, 330, 331, 332.

CONCLUSION

This case involves a question of general importance in the administration of the National Prohibition Act and the internal revenue laws, which was incorrectly decided by the Circuit Court of Appeals. The decision is in direct conflict with that of another circuit court of appeals. The petition for certiorari should therefore be granted.

Respectfully submitted.

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APRIL, 1931.

APPENDIX A.

STATUTES INVOLVED

Section 3453 of the Revised Statutes (U. S. C., Title 26, Sec. 1185) provides as follows:

> All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal-revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the circuit court or district court of the United States for the district where such seizure is made.

Section 22, Title II, National Prohibition Act, c. 85, 41 Stat. 305, 314, 315 (U. S. C., Title 27, Sec. 34), provides:

> An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, struc-

ture, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property.

Section 25 of the same Title (U. S. C., Title 27, Sec. 39) provides:

It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business

purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

APPENDIX B

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE

against

10 BOTTLES OF SCOTCH WHISKEY, ETC., THE National Cash Register Company, and Domestic Electric Company, Inc., appellants

---

UNITED STATES OF AMERICA, APPELLEE

against

ONE ONE-QUART BOTTLE OF GLYCERINE, PARTLY filled, and the various other articles and items of personal property seized at premises No. 140 Livingston Street, Brooklyn, New York, as listed in the Annexed Schedule A, the National Cash Register Company, appellant

Before MANTON, L. HAND, and CHASE, Circuit Judges.

Appeals by the claimants from decrees for the libellant upon libels of forfeiture of the District Court for the Eastern District of New York.

Leo de Nave for the appellants.

J. Bertram Wegman for the appellee.

L. HAND, *Circuit Judge:* In the first case the United States filed a libel of information to forfeit chattels, seized at 1286 Bedford Avenue, Brooklyn, among which was "ice cube Frigidaire." At that place one Collins "possessed" and had "custody and control" of "distilled spirits, subject to the tax imposed thereon by Section 900 of the Revenue Act of 1926, and beer containing more than one-half of one per centum of alcohol." These Collins possessed for the purpose of selling in fraud of the Internal Revenue Laws "and with design to avoid the payment of said taxes." The chattels were found and seized "within the place and building where the spirits and beer were seized." The second libel alleged the seizure of another lot of chattels, among which was a cash register, at 140 Livingston Street, Brooklyn, where one Powell possessed certain liquor and beer with intent to defraud the revenue, and glycerine and alcohol to make gin for the same purpose. The chattels seized were "within the same place" as the liquor, beer, and raw materials. The owner of the Frigidaire in the first suit, and the cash register in the second, appeared, made claim, and excepted to the libels for insufficiency in law. The district judge overruled the exceptions, and decreed a forfeiture, the claimants not wishing to plead over.

In *In Re Hurley*, 37 Fed. (2d) 397, Judge Adler concluded that the clause in R. S., Sec. 3453, "all tools, implements, instruments, and personal property whatsoever," must be confined to chattels used in the manufacture of raw materials into taxable articles with intent to defraud the revenue, and the Ninth Circuit adopted that view in *Ryan v. U. S.*, 44 Fed. (2d) 951. This would dispose of the Col-

lins suit, though not that of Powell. Judge Powell held in *U. S.* v. *38 Barrels of Spirits*, Fed. Cas. 16470, that the articles seized must be used in aid of the unlawful purpose, but, as the case before him concerned manufacture, he had no occasion to say, and did not, whether the section applied when no manufacture took place. Judge Choate, in *U. S.* v. *16 Barrels of Distilled Spirits*, Fed. Cas. 16300, had before him a case involving the possession of finished spirits, possessed with intent to defraud the revenue, and he held that all personal property on the premises was confiscable, regardless of its connection with the unlawful purpose. He ameliorated the severity of the result by construing "place or building" as including only those parts of the premises occupied by the possessor of the liquor. In *U. S.* v. *One Ice Box*, 37 Fed. (2) 120, Judge Woodward held confiscable the paraphernalia of a purveyor of liquors, who was not engaged in manufacture, the articles seized being, however, all in his possession in that part of the premises occupied by him. The same section was under discussion in *U. S.* v. *A Quantity of Tobacco*, Fed. Cas. 16, 106, and *U. S.* v. *Distillery at Spring Valley*, Fed. Cas. 14963, but the point here at bar was not decided.

It appears to us that to construe the clause in question as limited to cases of manufacture disregards the words "such articles" in the clause, "in the place or building, or within any yard or inclosure where such articles or raw materials are found." Except for the earlier form of this provision in the Act of 1864 there seems to be no room for doubt. The section begins by condemning all "articles" on which taxes are imposed. It extends

this by the next sentence to "raw materials" intended for the manufacture of "articles of a kind subject to tax," and concludes by including the tools, etc., in the place "where such articles or raw materials" may be. The apparent purpose was to cover the associates of manufactured articles as well as of raw materials; nor is there any antecedent reason to impute any difference.

The Act of 1864 scarcely justifies the opposite view. Indeed, the clause was mere jargon, as originally enacted. It read as follows: "all tools * * * in the place of building * * * where such articles on which duties are imposed, as aforesaid, and intended to be used by them in the fraudulent manufacture of such raw materials, shall be found." "Intended to be used by them in the fraudulent manufacture of such raw materials" does indeed more naturally refer to "tools, implements," and "instruments," but the position of the clause does not permit of such attribution. Nor does it better the sense to assume a transposition of the clause, so as immediately to follow "property whatsoever." The best escape, though it does much violence to the language, is to read the phrase as meaning, "and raw materials intended to be used by them in the fraudulent manufacture of such articles," and this is the substance of the amendment of 1866, when the section took its present form. Apparently the words were at once recognized as meaningless, and we think that the second version is alone to be taken as expressing the authoritative intent of Congress. Hence we hold that property is confiscable, when found in the same place or building as manufactured articles subject to tax.

It does not follow that the libels are good. The association of the chattels seized with the illicit liquor is alleged only by inference. In Collins's case the libel alleged that "the premises 1286 Bedford Avenue" were within the Eastern District of New York; that Collins possessed the liquor "at the said premises"; and that the chattels seized were "in or within the same place and building" as the liquors. In Powell's case the allegations are in substance the same, except that the chattels are alleged to be "in or within the same place" as the liquors and raw materials. We adhere to the view of Judge Choate that the chattels must be in a part of the building occupied by the possessor of the illicit liquor, and we may add, in a part associated in use with that where the liquors are possessed. The opposite view would result in fantastic injustice which was certainly outside the purpose of the law. *Stowell* v. *U. S.*, 133 U. S. 1, concerned only a brewery, and it was necessary to decide no more than that the brewery was part of the same premises as the illicit distillery which had been set up within it. Upon exception we may perhaps read the libels as alleging that Collins or Powell occupied that part of the building where the illicit liquors were found, but it seems to us an undue extension to read the words "same place" as intended to mean that the other chattels were there as well. "Place" seems to have been used in the libels as the equivalent of the building at the street number mentioned, and it is consistent with the allegations that the chattels were anywhere in those buildings and that Collins or Powell were not in occupation of the part where they were. Hence, to

succeed the libels must be amended to declare that the place where the chattels were seized was also in occupation of the possessor of the liquors, and was not divorced in use from that where the liquor or raw materials themselves were possessed.

This will not necessarily be enough. We do not now decide whether in addition it must appear that the chattels were in custody of the possessor, and if so, that they were being used as ancillary to the unlawful purpose. No doubt when the libels are amended the pleader will declare himself fully as to both these matters; we reserve judgment, since the questions may not arise.

Decrees reversed and causes remanded with leave to the libellant to plead over.

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 49

THE UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD RYAN, CLAIMANT OF ONE BRUNSWICK BAR, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 18) has not been reported. The opinion of the Circuit Court of Appeals (R. 58–61) is reported in 44 F. (2d) 951.

JURISDICTION

The decree of the Circuit Court of Appeals was entered November 17, 1930. (R. 61.) On February 16, 1931, the time for filing a petition for certiorari was, upon application of the Government, extended for a period of sixty days from that date.

The petition for certiorari was filed April 17, 1931, and was granted May 25, 1931. (R. 63.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal question presented is whether Section 3453 of the Revised Statutes provides for the forfeiture of all personal property found in a place where articles subject to tax are possessed for the purpose of being *sold or removed* in fraud of the internal revenue laws or with design to avoid payment of such tax, or whether that statute provides for the forfeiture of only such personal property as is found in a place where articles subject to tax are *manufactured* for such fraudulent purpose or with design to avoid payment of tax.

Other questions raised by the assignment of errors filed in the court below (R. 46–49) are whether Section 3453 was impliedly repealed by Sections 22 and 25, Title II, of the National Prohibition Act, and whether a libel for forfeiture under Section 3453 is barred by the institution of criminal proceedings under the National Prohibition Act against the person in whose possession the property libeled was found.

STATUTES INVOLVED

These are set forth in the appendix to this brief, pp. 25–30, *infra*.

STATEMENT.

On March 21, 1930, a libel was filed by the United States in the District Court for the District of Montana praying the forfeiture of a bar, back bar, and other saloon furnishings and equipment, alleged to have been seized by Federal prohibition agents in a soft-drink parlor operated by one George Lewis, in Butte, Montana, and to be then held by the Federal Prohibition Administrator within that district. (R. 1–3.) The libel averred that at the time of the seizure—

> the defendant George Lewis * * * within the premises hereinabove described, did then and there * * * have in his possession and * * * control certain goods, * * * to wit, whiskey, beer, and gin, a more particular description of which is to your informant unknown, * * * which said intoxicating liquors were goods and commodities for and in respect whereof a tax was then and there due and unpaid, which said intoxicating liquors were then and there in the possession, custody, and control of said defendant for the purpose of being sold or removed by him in fraud of the internal-revenue laws of the United States of America and with the design to avoid the payment of said taxes * * *.

Ryan, the respondent here, appeared as claimant and filed an answer in which he asserted that the property libeled had been seized upon a search warrant issued under the National Prohibition

Act; that in the execution of the warrant certain whiskey, beer, and gin, as well as the containers thereof, had been seized as authorized by the National Prohibition Act; that in addition thereto the officers executing said warrant, acting in excess of the powers conferred upon them by the National Prohibition Act and by the warrant, seized the property described in the libel; that none of the libeled property was designed for the manufacture of intoxicating liquor or intended for use in violating the National Prohibition Act and that at the time of its seizure the claimant was, and still is, the owner of such property and entitled to the immediate possession thereof. The answer denied that any part of the libeled property was subject to forfeiture for any violation of the internal revenue laws. (R. 9–15.)

Issue was joined on these pleadings. The evidence for the libelant clearly established that on February 24, 1930, the date of the seizure, tax-unpaid liquor was held for sale and was being sold by the libelee, George Lewis, on the premises where the libeled property was seized (R. 24–26), and that the libeled property was seized in the room occupied by Lewis for the sale of the liquor and was used by Lewis as ancillary to such sale (R. 27–32).

The claimant introduced in evidence the record of criminal proceedings against George Lewis showing that the latter had been indicted for the pos-

session of intoxicating liquor and the maintenance of a common nuisance in violation of the National Prohibition Act on the premises in question on February 24, 1930, when the property libeled was seized, and that upon being called for arraignment, Lewis had failed to appear. (R. 32, 36–37.) The claimant testified that he was the owner of the libeled property at the time it was seized; that he was not the owner of the premises and had no interest therein, and that Lewis had rented the furniture from the witness. (R. 40–41.)

Both sides having moved for a directed verdict at the close of all the testimony, counsel, at the suggestion of the court, entered into an agreement pursuant to which the jury was dismissed and the issues left for the determination of the court. (R. 42–43.) The District Court held (1) that Section 3453 of the Revised Statutes provides for the forfeiture of all personal property in any building or inclosure where articles subject to an internal revenue tax are possessed for the purpose of being sold with design to avoid payment of the tax, and (2) that there was no such direct conflict between Section 3453 of the Revised Statutes and Sections 22 and 25 of the National Prohibition Act as to effect an implied repeal of Section 3453. (R. 18–20.) A decree for the libelant was accordingly entered. (R. 22–23.)

Upon appeal the decree was reversed by the Circuit Court of Appeals (R. 58–61) on the sole ground that the District Court erred in construing Section

3453 as providing for the forfeiture of all personal property found in a place where articles subject to tax are possessed for the purpose of being *sold* with design to avoid payment of such tax, the appellate court holding that, except for articles subject to tax and raw materials intended to be manufactured into such articles, the only personal property which is forfeitable under Section 3453 is that found in a place where articles subject to tax are *manufactured*. This Court thereafter granted the Government's petition for a writ of certiorari. (R. 63.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that Section 3453 of the Revised Statutes does not provide for a forfeiture of personal property, other than articles subject to tax, which is found in a place where articles subject to tax are possessed for the purpose of being sold or removed in fraud of the internal revenue laws, or with design to avoid payment of such tax.

SUMMARY OF ARGUMENT

Section 3453 of the Revised Statutes plainly authorizes the forfeiture of property found in a place where taxable articles are possessed for the purpose of being *sold* or *removed* in fraud of the internal revenue laws. As the articles libeled in this case were found in such a place they were subject to forfeiture, as decreed by the District Court. The decision of the Circuit Court of Appeals that,

except for articles subject to tax and raw materials intended to be manufactured into such articles, the only personal property which is subject to forfeiture under Section 3453 is that found in a place where articles subject to tax are *manufactured* with intent to evade payment of such taxes, disregards the plain meaning of the language of the statute, is opposed to the intent of Congress as evidenced by the legislative history of the statute, and is contrary to an almost unbroken line of judicial decisions extending over a period of fifty years. It seems to stand alone except for a decision by the District Court for the Western District of New York which runs counter to a decision of the Circuit Court of Appeals for the same circuit subsequently rendered.

The libel for forfeiture was not barred by the institution of a prosecution under the National Prohibition Act against the person found in possession of the property libeled. The right of the Government to proceed against property declared forfeited by statute, regardless of any prosecution which may have been brought against the person in whose possession it was found, is settled by the recent decision of this Court in *Various Items of Personal Property et al. v. United States*, 282 U. S. 577.

Section 3453 was not impliedly repealed by Sections 22 and 25, Title II, of the National Prohibition Act. Section 3453 was designed to enforce payment of taxes, whereas Sections 22 and 25 were

intended to prevent the manufacture and use of beverage liquor. That both laws embrace parts of the same transactions does not establish direct conflict between them.

ARGUMENT

I

THE CIRCUIT COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF SECTION 3453 OF THE REVISED STATUTES

Section 3453 of the Revised Statutes (*infra*, p. 27) provides for the forfeiture of three classes of property, viz:

> (1) *All* goods, wares, merchandise, *articles*, or objects, *on which taxes are imposed*, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes;
>
> (2) All *raw materials* found in the possession of any person intending to manufacture the same into *articles of a kind subject to tax* for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and
>
> (3) All tools, implements, instruments, and personal property whatsoever, in the place or building or within any yard or inclosure where *such articles* or *raw materials* are found. (Italics ours.)

The Government contends that the property libeled in the instant case clearly falls within the third class. This conclusion is quite obvious if,

as held by the District Court, the words "such articles," in the third clause above set forth, refer to the articles mentioned in the first clause, *i. e.*, taxed articles found in possession of a person for the purpose of being *sold* or *removed* in fraud of the internal revenue laws. But the Circuit Court of Appeals treated the words "such articles," in the third clause, as referring only to the "articles" mentioned in the second clause, and held that the articles contemplated by the second clause were only those held for the purpose of *manufacture*. That court accordingly held that since the personal property sought to be forfeited in the instant case was not found in a place with raw materials intended to be manufactured into articles subject to tax, such property was not forfeitable. We submit that this construction of the statute is erroneous.

Section 3453 was a reenactment of Section 9 of the Act of July 13, 1866, c, 184, 14 Stat. 98, 111, amending Section 48 of the Act of June 30, 1864, c. 173, 13 Stat. 223, 240. Both the Act of 1864 and the Act of 1866 described the first of the classes of forfeitable property alike, as follows:

> all goods, wares, merchandise, articles, or objects on which duties ["taxes," in the Act of 1866] are imposed, etc.

The Act of 1864 described the second class:

> and also all articles of raw materials found in the possession of any person or persons intending to manufacture the same for the

purpose of being sold by them in fraud of said laws or with design to evade the payment of said duties.

The Act of 1866 described the second class:

and also all raw materials found in the possession of any person or persons intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulent[ly] selling such manufactured articles, or with design to evade the payment of said tax.

The Act of 1864 described the third class:

and also all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles on which duties are imposed, as aforesaid, *and intended to be used by them in the fraudulent manufacture of such raw materials* shall be found. (Italics ours.)

This language is confused and ambiguous and lends some support to the contention that *under the 1864 Act* only that property was forfeitable which was found in a place (1) where articles subject to tax were found, *and* (2) which was intended to be used in the fraudulent manufacture of raw materials. But since the "articles" described in the third clause are identical with those described in the first clause (i. e., "articles on which duties are imposed, as aforesaid") there would seem to be good ground for holding that Congress intended to make forfeitable not only property found with raw

materials for manufacture but also property found with taxable articles intended to be sold or removed in fraud of the revenue laws.

The Act of 1866, in describing the third class, followed the language of the earlier Act down to and including the word "articles" and omitted the words "on which duties are imposed, as aforesaid, and intended to be used by them in the fraudulent manufacture of such raw materials," substituting the words "or such raw materials." The present statute is substantially the same.

There is nothing to indicate that the change made in 1866 was meant to accomplish more than a clarification of language and the removal of the limitation on the forfeiture of personal property found with raw materials to personal property intended to be used in their manufacture. The later revision divides by a period the single sentence found in the earlier Acts; but all three clauses are joined by conjunctions now as they were then.

It may be added, with reference to the phrase "articles or raw materials" occurring in the present statute relating to the third class of forfeitable property, that the second clause does not include in its description "articles" at all, but only raw materials intended to be manufactured into articles subject to tax for the purpose of fraudulently selling them. In other words, the only thing forfeitable under the second clause is the raw material. The word "articles" in the third clause has no counterpart in the second in the form of articles in

existence, and can be given effect only by relating it to the same description that is found in the first clause and nowhere else.

The purpose and effect of this legislation was explained by District Judge Blatchford in *United States* v. *Quantity of Tobacco,* Fed. Cas. No. 16106 (decided in 1872), as follows (p. 654):

> A reading of the 48th section, giving the usual accepted meaning to the words found therein, seems to me to lead conclusively to the view that congress intended to forfeit taxable articles, when held, especially by their manufacturer, *for the purpose of being sold or removed in fraud of the revenue laws,* or with design to avoid the payment of the taxes which would accrue thereon by reason of such sale or removal, and also to forfeit all raw materials when held by a person intending to manufacture them into taxable articles for the purpose of fraudulently selling such articles, or with design to evade the payment of the taxes which would accrue thereon when sold or removed, and also to forfeit *all personal property found in the place where any such articles,* or any such raw materials, are found; and that possession, with the specified purpose, design, or intent, is all that is necessary to work the forfeiture. * * *
>
> * * * The section was amended by the act of July 13, 1866, to read as before recited, *being made more stringent as respected personal property, so as to cover all*

> *personal property found in the same place with either the articles or the raw materials and without reference to the intended use of such personal property.* (Italics ours.)

Similar views were expressed by the same judge in *Quantity of Distilled Spirits*, Fed. Cas. No. 11494, decided in 1868. With reference to a forfeiture sought under Section 48, as amended by the Act of 1866, he there said (p. 110):

> If these spirits, at the time of this seizure, on the 14th of February, 1868, were found on the place, in the possession or custody, or within the control, of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid the payment of the tax, then, not only are the spirits forfeitable under this section, but also all tools, implements, instruments, and personal property whatsoever, in the place or building where the spirits were found.

And again (pp. 111–112):

> If there were any spirits there, which these parties purposed to sell or remove in fraud of the law, or with design to avoid the payment of the tax, the spirits and everything in the establishment, are forfeited.

See also *United States* v. *Eighteen Barrels High Wines*, Fed. Cas. No. 15033; *United States* v. *Thirty-six Barrels of High Wines*, Fed. Cas. No. 16468 (p. 70). Cf. *United States* v. *Thirty-three Barrels of Spirits*, Fed. Cas. No. 16470 (1868).

In *United States v. Sixteen Barrels of Distilled Spirits*, Fed. Cas. No. 16300 (1879), District Judge Choate held the statute, then Section 3453 of the Revised Statutes, to have the effect earlier given it by Judge Blatchford in the cases above cited. In that case it was said (pp. 1098–1099):

> The argument of the claimant is that the words "articles or raw materials" do not refer to the words "all goods, wares, merchandize, articles, or objects," but only to the words "all raw materials found in the possession of any person intending to manufacture the same into articles." But the proper antecedent of the words "such articles" is the words "all goods, wares, merchandize, articles, and objects." These things before enumerated are here described under the general term "articles." There is no other sensible construction of the language nor anything else to which the term "such articles" can be held to refer with any regard to the grammatical meaning of the words. The words refer to something before mentioned in the section and are called articles as being "found" in the place. They cannot refer, therefore, to "articles" which might be in the future manufactured out of the raw materials found in the place, but which are not now found there. "Such articles" cannot, therefore, mean the articles which it is intended to manufacture out of the raw materials. The construction given to the section in this respect is that which it has uniformly

received in this court and in the circuit court in this circuit.

See also *United States* v. *Quantity of Rags*, Fed. Cas. No. 16103.

In *United States* v. *One Ice Box*, 37 F. (2d) 120 (N. D. Ill.), decided January 8, 1930, the Government sought forfeiture under Section 3453 of an ice box, bar, and other equipment of a saloon, on the ground that intoxicating liquors had there been possessed for sale with intent to avoid payment of the tax thereon. The court decreed such forfeiture, and in its opinion said (p. 122):

> An analysis of the section discloses its comprehensiveness. It provides for the seizure and forfeiture under the conditions there stated of (1) the contraband goods; (2) all raw materials intended to be manufactured into contraband goods with intent to sell them in fraud of the revenue laws; and (3) "all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure where such articles or raw materials are found."
>
> Naturally and grammatically the words "articles" and "raw materials," respectively, as used in the third classification, refer to the contraband articles and contraband raw materials referred to in the first and second classifications. The plain and natural meaning of the language used is that

all personal property in the same place where the contraband articles are found is the subject of forfeiture.

Three days after the foregoing case was decided it was held in *In re Hurley*, 37 F. (2d) 397 (W. D. N. Y.), that Section 3453 permitted the forfeiture only of personal property (other than that upon which taxes are imposed) which is found in a place or building where *manufacturing* takes place. In the opinion in that case District Judge Adler said (pp. 399, 400):

> The form in which the statute was in 1864, which I have quoted, is unambiguous on the point under discussion. Under the 1864 statute there is no question that personal property could be seized only in the building where manufacturing was done. The words making that clear were taken out by the amendment of the section in 1866. It might be said that these words were taken out in order to change the meaning of the section and make the seizure of the personal property apply to any place where the nonpaid taxed article was found, and not only to the place where it was being manufactured. I am not convinced, however, that that was the reason why these words were taken out. With these words in, the meaning of this part of the section was confusing because as it read it seemed to say that the articles on which duties are imposed must be intended to be used in the fraudulent manufacture of raw materials. Of course, that was never intended, and in the very next session of

Congress the section was amended. It is evident that the amendment was made to clarify that point and not to change the clear intent which was evident before the amendment that seizure of personal property could be made only where manufacturing took place.

* * * * * *

As I construe the statute, the words "such articles," where they appear in the phrase "within any yard or inclosure where such articles or raw materials are found," refer back only to the word "articles" toward the beginning of the sentence where they occur, and to the words "such manufactured articles" which appear in the same sentence a little farther on. Under the construction I have adopted only such other personal property can be seized which is found in the place or building where manufacturing takes place.

In *United States* v. *Ten Bottles of Scotch Whiskey*, 48 F. (2d) 545, the Circuit Court of Appeals for the Second Circuit, after referring to most of the cases discussed in this brief, held that the forfeiture provided for by the third clause of Section 3453 was not confined to personal property found in a place where taxable articles were manufactured, but extended to property found in places where such articles were sold or removed. In this regard the court said (pp. 546, 547):

It appears to us that to construe the clause in question as limited to cases of man-

ufacture disregards the words "such articles," in the clause, "in the place or building, or within any yard or inclosure where such articles or raw materials are found." Except for the earlier form of this provision in the Act of 1864, there seems to be no room for doubt. The section begins by condemning all "articles" on which taxes are imposed. It extends this by the next sentence to "raw materials" intended for the manufacture of "articles of a kind subject to tax," and concludes by including the tools, etc., in the place "where such articles or raw materials" may be. The apparent purpose was to cover the associates of manufactured articles as well as of raw materials; nor is there any antecedent reason to impute any difference.

* * * Hence we hold that property is confiscable, when found in the same place or building as manufactured articles subject to tax.

The court declared, however, that the chattels must be in a part of the building occupied by the possessor of the illicit liquor, and, adding that such chattels must be "in a part associated in use with that where the liquors are possessed," it held the libel defective for failure to allege these facts with sufficient clarity. In reversing the decree of forfeiture with leave to the libelant to plead over, it reserved decision as to the necessity for showing that the chattels sought to be forfeited were in the

custody of the possessor of the liquor, and, if so, that they were being used as ancillary to the unlawful possession.

In the instant case it is clear that the property described in the libel was found in that part of the building which was occupied and used by the possessor of the liquor for the illegal sale thereof and that it was in the custody of such possessor and used by him as ancillary to the unlawful business. (R. 24–25, 26–32.) The only question involving the construction of Section 3453 which is presented, therefore, is whether that statute authorizes the forfeiture of property found in a place where taxable articles are sold in fraud of the internal revenue laws. The holding of the court below that the statute is not to be so construed seems to be supported only by the decision in *In re Hurley, supra,* which is opposed to the decision subsequently rendered by the circuit court of appeals for the same circuit in the *Ten Bottles of Scotch Whiskey case, supra,* and the other decisions herein cited.

No reason has been suggested why one rule of forfeiture should apply to property found with articles intended to be sold or removed in fraud of the revenue laws and another to property found with raw materials intended to be manufactured in fraud of the revenue laws, especially since the intended use of the property is not material. The purpose of the forfeiture is the same with respect to both, i. e., the protection of the revenues by pun-

ishing evasions. In the light of that purpose it is not to be presumed that Congress intended the forfeiture of only the tax-unpaid articles in the one case and in the other the forfeiture of not only the raw materials but of the property found with them as well.

We submit that the court below erred in holding that the property libeled in this case does not come within the forfeiture provisions of Section 3453.[1]

II

SECTION 3453 WAS NOT IMPLIEDLY REPEALED BY SECTIONS 22 AND 25, TITLE II, OF THE NATIONAL PROHIBITION ACT

So far as can be gathered from the respondent's argument in the court below that Section 3453 was impliedly repealed by Sections 22 and 25, Title II, of the National Prohibition Act, his contentions are: (1) That the provisions of Section 22, providing for the abatement of liquor nuisances and for the closing of premises upon which they are maintained are in direct conflict with those of Section 3453 providing for the forfeiture of personal property found in a place where liquor subject to tax is sold with the intent to avoid the payment of such tax, and (2) that the provisions of Section 25, authorizing the issuance of warrants to search

[1] Although the court below based its decision solely upon its construction of Section 3453, other questions presented by the assignment of errors filed in that court are discussed in Points II and III.

premises in which liquor is unlawfully possessed and prescribing what may be seized and what disposition shall be made of the things seized, are also in direct conflict with the forfeiture provisions of Section 3453.

These contentions are plainly without merit. In *United States* v. *One Ford Coupe*, 272 U. S. 321, 332–333, this Court said:

> That since the Willis-Campbell Act, Congress has not intended to restrict any remedy theretofore given in aid of the revenue laws is clear.

The statutes alleged to be in direct conflict were enacted for different purposes and occupy different fields of governmental concern. Section 3453 was designed to enforce the payment of taxes on articles subject to tax. Sections 22 and 25, on the other hand, were intended to prevent the manufacture, transportation, and sale of beverage liquor. Under Section 3453 it is an essential element of the acts therein proscribed that they be committed with intent to defraud the internal revenue laws or to avoid payment of a tax. No such intent is involved in the offenses dealt with by Sections 22 and 25. That parts of the same transaction fall within the purview of both laws does not establish direct conflict between them. *United States* v. *One Ford Coupé*, *supra*, pp. 330, 331.

III

THE PROSECUTION OF THE PROPRIETOR UNDER THE NATIONAL PROHIBITION ACT DID NOT PRECLUDE FORFEITURE OF THE LIBELED PROPERTY UNDER SECTION 3453.

The respondent's contention that prosecution of the proprietor of the premises upon which the libeled property was seized, under the National Prohibition Act, precludes forfeiture under Section 3453 is apparently based upon *Commercial Credit Co.* v. *United States*, 276 U. S. 226, and *Richbourg Motor Co.* v. *United States*, 281 U. S. 528. In the first of these cases it was held that where the person in charge of an automobile found transporting liquor in violation of the National Prohibition Act has been convicted of such illegal transportation, Section 26, Title II, of that Act provides the exclusive mode for forfeiting the vehicle. In the second case it was held that an automobile seized while transporting liquor in violation of the National Prohibition Act may not be forfeited under Section 3450 of the Revised Statutes because the provisions of Section 26 are mandatory and require the Government to proceed for the forfeiture under that section. Section 26 only deals with proceedings after discovery of persons in the act of unlawful transportation of intoxicating liquors, and, so far as it refers to proceedings *in rem*, concerns only the liquor transported and

the transporting vehicle. It can have no reference to a seizure under Section 3453. Obviously the decisions cited are without application to the instant case. That, where not otherwise provided by law, property declared forfeited by statute may be proceeded against regardless of any criminal prosecution which may have been instituted against the person charged with its illegal use, is settled by the decision of this Court in *Various Items of Personal Property et al.* v. *United States*, 282 U. S. 577.

Respondent's contention, made in the court below, that, acting under a search warrant issued under Section 25 of the National Prohibition Act, the officers seized property not described in the warrant and in excess of the authority conferred upon them by that Act, is without foundation. The record shows (R. 31) that before any seizure was made the officer having a warrant in his possession observed the proprietor of the place selling liquor for beverage purposes and placed him under arrest. As the liquor was obviously tax-unpaid, the officer was justified in seizing any property declared by Section 3453 to be subject to forfeiture and needed no warrant to authorize such seizure. *Vachina* v. *United States*, 283 Fed. 35, 36 (C. C. A. 9th); *Fryar* v. *United States*, 3 F. (2d) 593 (C. C. A. 6th); *Billingsley* v. *United States*, 16 F. (2d) 754, 756 (C. C. A. 8th); *Lee Kwong Nam* v. *United States*, 20 F. (2d) 470 (C. C. A. 2d).

CONCLUSION

The decree of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

Sec. 48 of the Act of June 30, 1864, c. 173, 13 Stat. 223, 240, is in part as follows:

> *And be it further enacted,* That all goods, wares, merchandise, articles or objects on which duties are imposed by the provisions of law, which shall be found in the possession or custody, or within the control, of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid payment of said duties, may be seized by any collector or deputy collector, who shall have reason to believe that the same are possessed, had, or held for the purpose or design aforesaid, and the same shall be forfeited to the United States; and also all articles of raw materials found in the possession of any person or persons intending to manufacture the same for the purpose of being sold by them in fraud of said laws, or with design to evade the payment of said duties, and also all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure where such articles on which duties are imposed, as aforesaid, and intended to be used by them in the fraudulent manufacture of such raw materials, shall be found, may also be seized by any collector or deputy collector, as aforesaid; and the same shall be forfeited as aforesaid; and the proceedings

to enforce said forfeiture shall be in the nature of a proceeding in rem in the circuit or district court of the United States for the district where such seizure is made, or in any court of competent jurisdiction.

Section 9 of the Act of July 13, 1866, c. 184, 14 Stat. 98, 111, is in part as follows:

That section forty-eight be amended by striking out all after the enactment clause and inserting the following: That all goods, wares, merchandise, articles, or objects, on which taxes are imposed by the provisions of law, which shall be found in the possession, or custody, or within the control of any person nor persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the commissioner of internal revenue for that purpose, and the same shall be forfeited to the United States; and also all raw materials found in the possession of any person or persons intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulent[ly] selling such manufactured articles or with design to evade the payment of said tax; and also all tools, implements, instruments, and personal property whatsoever, in the place or building or within any yard or enclosure where such articles or such raw materials shall be found, may also be seized by any collector or deputy collector, as aforesaid, and the same shall be forfeited as aforesaid; and the proceedings to enforce said forfeiture shall be in the nature of a proceeding in rem

in the circuit or district court of the United States for the district where such seizure is made, or in any other court of competent jurisdiction.

Section 3453 of the Revised Statutes (U. S. C., Title 26, Sec. 1185) provides as follows:

> All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal-revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the circuit court or district court of the United States for the district where such seizure is made.

Section 22, Title II, National Prohibition Act, c. 85, 41 Stat. 305, 314, 315 (U. S. C., Title 27, Sec. 34), provides:

An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discre-

[illegible] owner, [illegible] shall give [illegible] approved by [illegible] the penal [illegible] $500 [illegible] United States, and [illegible] eating liquor will not [illegible] tured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property.

Section 25 of the same Title (U. S. C., Title 27, Sec. 39) provides:

> It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property as is seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was not unlawfully held or possessed, or had not been unlawfully used, the liquor and all property designed for the unlawful manufacture of liquor, shall be destroyed [illegible] shall otherwise order. [illegible] shall issue a search warrant [illegible] caused as such [illegible] unlawful sale of [illegible] laws of [illegible] peace, such as a [illegible] hotel, or [illegible]

vate dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

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In the Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

EDWARD RYAN, Claimant of One Brunswick Bar, etc.,
Respondent.

BRIEF FOR THE RESPONDENT

Supplemental Statement.

The search and seizure were made February 24th, 19[illegible] at 7 West Galena Street, Butte, Montana, under a search warrant. The liquor seized consisted of two quarts of moonshine whiskey, a gallon jug about half full of moonshine whiskey; two quarts, or bar bottles, fifths of gallons; one gallon jug of gin, and twenty-seven pint bottles of home brew beer. There were no internal revenue stamps on any of the bottles. "It wasn't a distillery or warehouse or place of business of rectifier or wholesale liquor distillery. It was a joint. Just the usual barroom." (R. 26-27.) The liquor was not guaged for the purpose of ascertaining what Internal Revenue taxes, if any, were due and not paid. All of

the liquor was destroyed by Prohibition Officer Holter immediately upon its seizure, after filling a half-pint bottle. "You didn't have any Internal Revenue taxes on your mind at that time, did you? No, it was whiskey I poured out. I poured it out because I found this man in possession selling intoxicating liquor over the bar. That certainly was what I arrested him for. That's what I made the seizure for." (R. 31.) The search warrant was issued upon affidavit and complaint for a violation of Title II of the National Prohibition Act. (R. 33-34.) It commanded search and seizure under the provisions of Title II of the National Prohibition Act and none other. It specified the things to be seized, but included none of the articles here claimed by the respondent. The return discloses the seizure, under the warrant, of these articles (R. 37-39).

George Lewis, the man in possession and who it is charged sold intoxicating liquors at said 7 West Galena Street, was arrested and subsequently indicted by the grand jury on four counts, namely; selling intoxicating liquor without a permit from the commissioner of internal revenue, possession of intoxicating liquor intended for use in violation of Title II of the National Prohibition Act (2 counts), and unlawful maintenance of a common nuisance in violation of Title II of the National Prohibition Act. (R. 36.)

On May 23rd, 1930, Lewis was called for arraignment and plea but failed to appear. On motion of the district attorney, his default was entered, his bond forfeited, bench-warrant was issued and new bail fixed. (R. 37.)

The libel of information in the case at bar was filed

March 21st, 1930. (R. 3.) The marshal's return to the warrant of arrest and monition shows that he received the paper March 21, 1930, and executed it on the 24th day of March, 1930, "by attaching the following articles stored with the Jones Storage and Transfer Co., at Wyoming and Iron Streets, Butte, Montana, to-wit: (describing the articles herein involved) (R. 7) and the same property theretofore seized by prohibition officer Holter on February 24th., 1930, under the search-warrant above referred to. (R. 39.) Trial was had May 20th., 1930. (R. 24.) At its conclusion, upon respondent's motion for a directed verdict, the court's attention was specifically directed to the pending criminal action against Lewis under the indictment above referred to, whereupon the court observed: "I suppose you are working on the point of having possession under the Prohibition Act? Qualifying on a point of law?" Counsel: "A point of law."

No question was raised by assignment of error, or otherwise that Section 3453 R. S. (1185 U. S. C.) was impliedly repealed by the provisions of the National Prohibition Act. (R. 46-49.) The question was on the election of remedies.

SUMMARY OF ARGUMENT

I.

Section 3453 of the Revised Statutes (26 U. S. C. A. 1185) contains three sentences. In 1864 and as amended in 1866 the section consisted of a single sentence. Conflicting judicial constructions were placed upon it. When carried forward into the Revised Statutes it was punctuated as it now stands. It declares the law as of

December first, 1873, the effective date of the Revised Statutes. Under it only goods, wares, merchandise, articles, or objects on which taxes are imposed, and evaded, are subject to seizure and forfeiture, as declared in the first sentence. Tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure, are subject to seizure and forfeiture only when associated with a manufactory of some kind, as declared in the second sentence of the statute. (*In re Hurley*, 37 F. (2d) 397.)

Contemporaneous construction is controlling. For a half century (1879-1930) the Department of Internal Revenue did not avail itself of the provisions of the statute to seize other than articles *per se* contraband unless associated with a manufactory of some kind, so far as the reported cases disclose.

The language of the statute supports the construction given to it by the Circuit Court of Appeals. (R. 58-61.)

II.

In this case there was an election of remedies by the United States and the Government is bound thereby, though the Circuit Court found it unnecessary to base its decision upon this ground, urged in the trial court. (R. 47, Assignment of Error No. II.)

A prosecution was instituted under the National Prohibition Act. The property involved herein was seized by a Prohibition Enforcement Agent armed with a search-warrant issued under the provisions of the National Prohibition Act. (R. 33-35, 37-39.) The seizure was adopted and the property was in *custodia legis*, stored in a public ware-house, when it was again seized (?) by the United States Marshal under a war-

rant and monition issued in this libel proceeding. (R. 7.) The person in charge of the place where the property was first seized at 7 West Galena Street, Butte, Montana, was indicted by the grand jury for violation of the National Prohibition Act, the fourth count charging him with the maintenance of a common nuisance " * * * in violation of Title II of the National Prohibition Act." (R. 36-37.)

Under the facts the National Prohibition Act governs, (Section 22, 25, Title II, 27 U. S. C. A., 34, 39) as it does in transportation cases. (*Richbourg Motor Company v. United States,* 281 U. S. 528.)

Both propositions advanced by us are supported by numerous authorities cited in the following argument.

ARGUMENT

I.

The epitome of the revenue statute as set down by counsel for petitioner in opening the argument on page 8 of the brief for the United States serves to illuminate the contentions advanced favoring a construction of the law to harmonize with the conclusions reached by Judge Woodward in the Ice Box case (*U. S. v. One Ice Box,* 37 F. (2d) 120 (N. D. Ill.)), and by Judge Hand of the Circuit Court of Appeals for the Second Circuit in the recent case of *United States v. Ten Bottles of Scotch Whiskey,* 48 F. (2d) 545, wherein the learned Judge had occasion to observe, while commenting on the statute as it stood in 1864, and as it appeared after amendment in 1866: "The best escape, though it does much violence to the language, is to read the phrase as meaning, etc., "in referring to the second clause of the second sentence,

of the section. We submit the law should not rest upon a construction obviously grounded upon speculation as to the legislative intent. This Court once quoted an English jurist who said: 'I venture to lay it down as a general rule respecting the interpretation of deeds that all latitude of construction must submit to this restriction; namely, that the words may bear the sense which by construction is put upon them. If we step beyond this line we no longer construe men's deeds, but make deeds for them.' This rule is as applicable to a statute as a deed."

United States v. Union Pac. R. R. Co., 91 U. S. 72-86.

The statute under consideration (*R. S.* 3453 (26 *U. S. C. A.* 1185)) is correctly quoted in the appendix to petitioner's brief at page 27. It will be observed the section is composed of three sentences. The first sentence deals with things contraband *per se*, and provides for their seizure and forfeiture. The second sentence is divided into two parts, separated by a semi-colon, and deals with two classes of things. The first relates to raw materials found in the possession of any person intending to manufacture the same "into articles" of a kind subject to tax for the purpose of fraudulently selling such "manufactured articles," or with design to evade the payment of such tax. The second part of the sentence is important, for under its language petitioner's position becomes tenable, if at all. It reads:

"* * * and all tools, implements, instruments and personal property whatsoever, in the place or building, or within any yard or inclosure where such

articles are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid."

The third sentence relates to proceedings "to enforce such forfeitures"; i.e., things seized under the provisions of both preceeding sentences.

Prior to being carried forward to become section 3453 of the Revised Statutes, the section stood as a single sentence (Appendix, petitioner's brief, pp. 25-26). It was during this period District Judge Blatchford decided the two cases relied upon by petitioner and cited in the brief, pp. 12-13, namely, *United States v. Quantity of Tobacco,* (1872) Fed. Cas. No. 16106, and *Quantity of Distilled Spirits,* (1868) Fed. Cas. No. 11494. All authorities agree that prior to the amendment of 1866, the portion of the section under consideration was ambiguous and meaningless. Apparently when Judge Blatchford undertook to construe the statute after its amendment, but before it was incorporated into the Revised Statutes, he was dealing with the component parts of a single sentence, and his conclusions are therefore not surprising. Be that as it may, the fact is that the compilors of the Revised Statutes saw fit to punctuate the section so as to set it off in three separate sentences, each with a distinct and separate subject matter, and it is with the section thus punctuated that we must now deal.

Dwight v. Merritt, 140 U. S. 213.

The Revised Statutes constitute the legislative declaration as of December 1st, 1873.

Rate Refrigeration Co. v. Saltzberger, 157 U. S. 1; *United States v. Bowen,* 100 U. S. 508.

"Even in construing the terms of a statute, courts must take notice of the history of the legislation and out of the different possible constructions, select and apply the one that best comports with the genius of our institutions and therefore most likely to have been the construction intended by the law making power."

Texas & Pac. Ry. v. Interstate Commerce Commission, 162 U. S. 197-218.

In this connection it is noteworthy to observe the cases relied upon by counsel for petitioner, bearing directly upon a construction of the statute (*R. S.* 3453), all admit the harshness of a construction leading to the forfeiture of innocent personal property merely because of its association with or proximity to contraband commodities, and seek to limit such seizures to the immediate vicinity, or within the same room, where they may be found. This in spite of the fact that the second clause of the second sentence of the section provides for seizure and forfeiture of "all tools, etc., in the place or building, or within any yard or inclosure where such articles or raw material are found, * * *." Thus, in the recent case of *United States v. Ten Bottles of Scotch Whiskey,* 48 Fed. (2d) 545, two libels of information were each held defective:

"In Collins' case the libel alleged that 'the premises 1286 Bedfore Avenue' were within the East-

ern District of New York; that Collins possessed the liquor 'at the said premises': and that the chattels seized were 'in or within the same place or building' as the liquors. In Powell's case the allegations are in substance the same, except that the chattels are alleged to be 'in or within the same place' as the liquors or raw materials. *We adhere to the views of Judge Choate* that the chattels must be in a part of the building occupied by the possessor of the illicit liquor, and we may add, in a part associated in use with that where the liquors are possessed. *The opposite view would result in fantastic injustice which is certainly outside the purpose of the law.* * * * 'Place' seems to have been used in the libels as the equivalent of the building at the street number mentioned, and it is consistent with the allegations that the chattels were anywhere in those buildings and that Collins or Powell were not in the occupation of the part where they were. Hence, to succeed the libels must be amended to declare that *the place where the chattels were seized was also in occupation of the possessor of the liquors, and not divorced in use from that where the liquor or raw materials themselves were possessed.*

"This will not necessarily be enough, we do not now decide whether in addition it must appear that the chattels were in custody of the possessor, and if so, that they were being used as ancillary to the unlawful purpose." (Italics supplied.)

The views of Judge Choate were expressed in 1879, and counsel for petitioner say the Judge held the statute to have the effect earlier given it by Judge Blatchford. (Petitioner's brief, p. 14.) Counsel quote Judge Blatchford as holding (1868): "not only are the spirits

forfeitable under this section, but also all tools, implements, and personal property whatsoever, in the place or building where the spirits were found," and again: "the spirits and everything in the establishment are forfeited." (Id., p. 13.) It thus appears that the precedents relied upon by Judge Choate do not coincide with the views to which he adhered. Indeed, it appears there was great divergence of opinion amongst the various courts in the early cases dealing with this statute. Further illustrations may be found in the opinion of Judge Rudkin in the case at bar (R. 59-60), wherein he declares, "* * * the decisions of the Circuit and District Courts, both early and late, are in hopeless conflict." It is noteworthy to observe that the early cases were all decided between 1868 and 1879:

> "* * * and for the next half century, so far as we are advised, there is no reported case on the subject under consideration. As said by the court In re Hurley (37 F. (2d) 397, 401), decided during the present year:
>
> "'Since 1879, so far as disclosed by reported cases, the Department of Internal Revenue of the United States has not availed itself of this statute to seize personal property other than contraband goods, except in the case of a distillery or manufactory of some kind.'" (R. 60.)

This fact influenced the court in deciding the case as it did.

> "A reference to the decided cases clearly demonstrates that the question with which we are now confronted is by no means free from doubt or difficulty, but in view of the apparent attitude of the

> department charged with the administration of the revenue laws during the past fifty years, and in view of the inequality, if not injustice, that would necessarily result from a strict enforcement of the forfeiture provisions of the statute, as construed by the court below, we feel constrained to hold that the provisions should be limited or restricted to places where the contraband articles are manufactured as in C. I. T. Corporation v. United States decided by this court November 10, 1930." (44 F. (2d) 950.) (R. 60-61.)

The decision is grounded upon sound precedent. The contemporaneous construction of a law by those called upon to act under it is entitled to great respect, especially when long acquiesced in, and practical action thereunder will be followed by the courts in the construction of statutes which are ambiguous or doubtful.

Prigg v. Pennsylvania, 16 Pet. 539;
The City of Panama v. Phelps, 101 U. S. 453;
United States v. Pugh, 99 U. S. 265;
Hahn v. United States, 107 U. S. 402;
U. S. v. Sweet, 189 U. S. 471;

Logan v. Davis, 233 U. S. 613, and cases cited on page 627, in support of the declaration:

> "The practical interpretation of an ambiguous statute is entitled to highest respect and if acted upon for a number of years will not be disturbed except for very cogent reasons."

In *Shell's Executors v. Tauche*, 138 U. S. 562, it appears six actions were consolidated to recover back duties alleged to have been illegally exacted by the Collector

of the Port of New York. Questions of procedure were involved. This court said (p. 572):

> "In all cases of ambiguity the contemporaneous construction, not only of the courts but of the departments, and even the officials whose duty it is to carry the law into effect, is universally held to be controlling." (Citing cases.)

It is noteworthy to observe in this connection that Judge Adler, in the *Hurley* case, and Judge Rudkin, in the case at bar, each recognized the force and applicability of this well established rule of statutory construction; while, on the other hand, the rule utterly fails of recognition or consideration by Judge Woodward, in the Ice Box case, and by Judge Hand, in the Ten Bottles of Scotch Whiskey case. This fact should be persuasive, and if there be any doubt in ascertaining the true legislative intent, from a reading of the statute (R. S. 3453 (26 *U. S. C. A.* 1185)) we believe such doubt should be resolved in favor of respondent by an affirmance of the judgment herein.

But we earnestly contend the statute is susceptible of but one rational construction and it is that given it by Judge Adler in the Hurley case. (*In re Hurley*, 37 F. (2d) 397.) It seems to us that when the section, containing but a single sentence, was carried forward into the Revised Statutes, punctuated so as to divide it into three separate sentences, each with a separate and distinct subject matter, the punctuation was made for the definite purpose of freeing the section from the doubtful judicial constructions theretofore given it by the courts, as in *United States v. Quantity of Tobacco, Quantity of*

Distilled Spirits, and Cf. *United States v. Thirty-three Barrels of Spirits*, cited by counsel for the United States on pages 12 and 13 of their brief. After the effective date of the adoption of the Revised Statutes (Dec. 1, 1873), it appears the section was considered and construed in 1879 by District Judge Choate in *United States v. Sixteen Barrels of Distilled Spirits*, cited on page 14 of their brief. Thereafter a half century slipped by, and on January 8th, 1930, Judge Woodward, of the Illinois District Court, handed down the court's decision in the Ice Box case (*U. S. v. One Ice Box*, 37 F. (2d) 120), citing and following the reasoning of the early cases above referred to. Three days later, January 11, 1930, came the decision in the *Hurley* case. Among other things Judge Adler said:

> "Since 1879, so far as disclosed by reported cases, the Department of Internal Revenue of the United States has not availed itself of this statute to seize personal property other than the contraband goods, except in the case of a distillery or manufactory of some kind. The Department of Prohibition is now attempting to make seizure under this old revenue statute. The case under discussion and a number of other cases now before me are in fact ordinary violations of the National Prohibition Law (27 U. S. C. A.). That act furnishes an adequate remedy, and in the judgment of Congress adequate punishment for its violation. It is not necessary or desirable for the Prohibition Department to try to operate under an old taxing statute which, while technically in force was not intended to be used to enforce the Eighteenth Amendment to the Constitution."

In re Hurley, 37 F. (2d) 397.

An examination of the statute (*R. S.* 3453 (26 *U. S. C. A.*, 1185)) shows the first sentence refers only to contraband things that may be seized and forfeited under the circumstances therein named. It embraces a complete legislative declaration upon the subject, and it includes a forfeiture clause. The second sentence covers two distinct classes of things made the subjects of seizure and forfeiture, and there is one forfeiture clause at the end covering both classes. The sentence is divided into two parts, separated by a semi-colon. The first part embraces "raw materials" * * * "manufacture the same into articles". * * * "manufactured articles"; condemned, but not forfeited under this clause. The second clause embraces "tools, implements, instruments," * * * "personal property" * * * "in the place or building, within" * * * "yard" * * * "enclosure where such articles or raw materials are found, may also be seized" * * * "forfeited as aforesaid." The second sentence, resolved into its component parts, to show the relation of these several parts, by the application of the common rules of grammatical construction, discloses the words "such articles or raw materials", found in the second clause, refer to, relate back, and become associated only with the words, "raw materials", "articles", and "manufactured articles", found in the first clause. The seizure and forfeiture phrase in the second clause clearly circumscribes and limits the things subject to seizure and forfeiture to those named in the second sentence, as does the seizure and forfeiture phrase in the first sentence limit and circumscribe things condemned in the first sentence. Were it otherwise we may well assume the enactment would have included a seizure and forfeiture

clause at the end of the first clause of the second sentence to harmonize with that in the first sentence, and the second clause of the second sentence made a third and separate sentence with a coverall seizure and forfeiture clause covering tools, etc., to apply to, both the contraband things named in the first sentence and those named in the first clause of the second sentence. Or, on the other hand, a single seizure and forfeiture clause covering the whole section would have sufficed. However, we deal with the statute as we find it. The first forfeiture provided for covers things taxable; the second covers raw materials, manufactured goods subject to tax, and innocent chattels found in association therewith, obviously at a manufactory of some kind and not elsewhere.

Of course statutes must yield to grammatical construction where possible. Punctuation is often found to be a fallible test. Here, however, we find a statute deliberately punctuated in a manner obviously designed to facilitate an understanding of its language and to illuminate more fully the legislative intent in its passage. After the lapse of a half century the statute is called into prominence, not by the Treasury Department, charged with the duty of enforcing its provisions, but by National Prohibition Agents bent on enforcing the National Prohibition Act; the seizures made by them being thereafter "Adopted by the Government" (R. 3.) to bring the property seized within the court's jurisdiction. In the case at bar the property owned and claimed by respondent was already in *custodia legis*, stored in a public warehouse, when seized (?) by the Marshal. (R. 3, 7-9.) It was not then "in the place or building,

or within any yard or inclosure where such articles or raw materials" (1 gallon moonshine whiskey; 1½ gallons gin; 27 pints home brew beer) (R. 39) were found.

We respectfully submit the Circuit Court of Appeals for the Ninth Circuit did not err in holding the property libeled in this case does not come within the forfeiture provisions of *R. S.* 3453 (*26 U. S. C. A.*, 1185.)

II.

From what has been said above we do not wish to be understood as yielding to the proposition that seizures and forfeitures may be had under the Revenue Act when, as in this case, prosecution under the National Prohibition Act is commenced and is pending during the time the libel proceeding is instituted and terminated in the trial court. The record here discloses, as pointed out in the supplemental statement, such to be the facts in this case.

We take the view that this court is not necessarily concerned with the reasons prompting the judgment here under review if it is supported by the record. (4 *C. J.* 1080, Sec. 3066) even though the grounds or reasons therefor may not be sustainable. (4 *C. J.* 1132, Sec. 3125.)

Other grounds for the reversal of the judgment of the trial court were urged upon the appeal to the Circuit Court of Appeals (R. 46-49), but that court found it unnecessary to consider them and based its conclusions solely upon a construction of the Revenue Act (*R. S.* 3453 (*26 U. S. C. A.*, 1185). Thus the scope of the decision embraces all proceedings in rem under that statute, without regard to criminal prosecution under

the National Prohibition Act, under the same state of facts. Based upon this ground alone we believe the judgment is sound. Yet we urge this Court to give consideration, if it be deemed expedient, to the following assignment of error:

Assignment of Error No. II (R. 47):

"The court erred in holding and deciding the property described in the libel of information is forfeited and now condemned under the provisions of Section 1185, Title 26, U. S. Codes, for that when the seizure of the property was made, to-wit, on the 24th day of February, 1930, it was seized under a search warrant issued by L. M. Van Etten, a United States Commissioner for the District of Montana, Butte Division, to Ben Holter, a National Prohibition Agent, acting as an officer of the court, and the libelee, George Lewis, was arrested in connection with said seizure for the unlawful possession of intoxicating liquor in violation of the National Prohibition Act, and thereafter an indictment charging the said George Lewis with the unlawful sale of intoxicating liquors; the unlawful possession of intoxicating liquors, and the maintainance of a common nuisance in connection therewith at said 7 West Galena Street, Butte, Montana, in violation of Chapter 2, Title 27, U. S. Codes, based upon his arrest, as aforesaid was returned by the grand jury, and the said George Lewis was held under bail thereunder in that certain criminal action pending in the above entitled court No. 2449, entitled: 'United States of America, Plaintiff, vs. George Lewis, et al., Defendants,' and the said cause was set for trial in the above-entitled court on the 23rd day of May, 1930, and said cause being ready for trial was called for trial, and the said George

Lewis, defendant, failing to appear, his bail was forfeited and a bench-warrant issued for his apprehension, all of which appears by the records in said criminal cause received in evidence at the trial of this libel action, by reason whereof, the libelant herein elected unconditionally to proceed under the National Prohibition Act, and not under any Internal Revenue statute, particularly not under Section 1185, Title 26, U. S. Codes."

Counsel for the United States are correct in assuming that we rely upon *Commercial Credit Co. v. United States,* 276 U. S. 226, and *Richbourg Motor Co. v. United States,* 281 U. S. 528, to sustain our views. (Brief, 22.) Their conclusion is wrong, however, that we are foreclosed by the decision of this Court in *Various Items of Personal Property et al. v. United States,* 282 U. S. 577. (Brief, 23.) Wrong, because they have overlooked the facts in the case. In that case a seizure at a distillery *without a search-warrant* was involved. A libel of information was filed under sections 3257-3281, Revised Statutes, of property constituting a distillery, warehouse, denaturing plant, and their contents, on premises located within the Western District of New York. Waterloo Distillery Corporation conducted the business of distilling and denaturing alcohol under permit from the Bureau of Prohibition. The libel charged attempt to defraud the United States of tax imposed by section 600A of the *Revised Statutes* of 1918 (26 *U. S. C. A.,* Sec. 245), whereby the Government claimed the property became subject to forfeiture under sections 3257, 3258, Revised Statutes. Specific charges of unlawful withdrawals and diversions for

beverage purposes were alleged. The seizure was made by National Prohibition Enforcement officers *without any search-warrant.* In the opinion of the court below it is said (40 F. (2d) 422, 424):

> "The judgment is challenged on the theory that sections 3257 and 3281 are in direct conflict with section 25 and section 22 of title 2 of the Prohibition Act (27 U. S. C. A., sec. 3). *Section 25 relates to property seized under search-warrant and makes the property so seized subject to such disposition as the court may order. Had there been such a seizure that section might preclude forfeiture under the revenue laws.* (Italics supplied.) Cf. Commercial Credit Co. v. United States, 276 U. S. 226."

There was a prosecution and conviction under Section 600-A of the *Revenue Act of 1918*, and the National Prohibition Act was not involved.

We submit there is nothing in the opinion of this Court in the case cited to indicate a contrary view. Section 25 of the *National Prohibition Act* (27 *U.S.C.A.* 39) (Brief, Appendix, p. 29) is specific upon the point. The Commercial Credit Company case cited above was decided February 20th, 1928, and it holds that the conviction of the driver of an automobile for illegal possession of intoxicating liquor following his arrest when discovered in the act of transportation requires a disposition of the vehicle under the provisions of section 26 of the *National Prohibition Act* (27 *U. S. C. A.* 40), and precludes subsequent proceedings against it under the Revenue Act (26 *U. S. C. A.* 1181), for forfeiture for intent to defraud the Government of a revenue tax.

On the other hand, where no prosecution is had under the National Prohibition Act, a proceeding in rem under the revenue laws is proper, as in *United States v. One Ford Coupe*, 272 U. S. 321. (Brief, 21.) But, the decision of this Court in *Richbourg Motor Company v. United States*, 281 U. S. 528, settles beyond further controversy that, in transportation cases, the instrumentalities used in the conveyance of intoxicating liquors, contrary to law, may be seized and disposed of only under the provisions of the National Prohibition Act (27 *U. S. C. A.* 40), Referring to the Willis-Campbell Act, this Court declared:

> "By Section 5 of the Willis-Campbell Act of November 23, 1921, chap. 134, 42 Stat. at L. 222, 223, U. S. C. title 27, Section 3, all laws relating to the manufacture, taxation and traffic in intoxicating liquors and penalties for their violation, in force when the National Prohibition Act was adopted, were continued in force except such provisions as are 'directly in conflict with any provisions of the National Prohibition Act'."

The Court reviews and comments upon its earlier decisions involving prohibition cases, and declares:

> "In providing for forfeitures under this section, Congress was not unaware that the enactment of the National Prohibition Act would enormously increase seizures of vehicles, beyond those made under Section 3450, and that their forfeiture would place an increased and heavy burden on many innocent persons, unless afforded some protection by the new legislation. By Section 26 it gave such protection in all cases where the prosecution of the person guilty of the transportation

is had under the National Prohibition Act. This would have been but an idle gesture and the congressional purpose would have been defeated if, in practically every case where the transporting vehicle is seized, the prosecuting officers could compel forfeiture of the interests of innocent third persons under Section 3450. Yet, that is the effect of the construction of Section 26 contended for by the government, since, with the enactment of national prohibition, there can be few cases of illegal transportation which do not involve the concealment of non-tax paid liquor. See United States v. One Ford Coupe Auto, supra (272 U. S. 326, 71 L. ed. 283, 47 A. L. R. 1025, 47 Sup. Ct. Rep. 154),"

As to transportation cases, the Court takes the position that in the enactment of the National Prohibition Act Congress used carefully chosen language:

"We think that Congress did not take the precaution to enact the carefully chosen language of Section 26 merely to impose general duties on prosecuting officers already placed on them by other sections of the act, but that its purpose was to preclude the nullification of the protection which Section 26 had extended to innocent third persons."

In view of the above, we must assume the National Prohibition Act as a whole is circumscribed with carefully chosen language, and within its confines if it is disclosed a complete and adequate remedy is afforded in cases where the charge is for unlawful possession of intoxicating liquors, unlawful sale, and the maintenance of a common nuisance in connection therewith,

then the revenue statutes may not be resorted to for the imposition of additional penalties and forfeitures, notwithstanding the Willis-Campbell Act.

In view of what we have said in this Brief, we respectfully advance the contention that when the Congress passed the Volstead Act the language of that Act was deliberate, unambiguous and complete, and provided ample remedies for its violation. As to transportation cases, we have learned that Act alone can be applied to the confiscation and condemnation of the instrumentalities used in the act of transportation, (*Richbourg Motor Company v. United States*, et al., supra), and we now advance the contention that when one is found in the possession of and is selling intoxicating liquors contrary to law, and maintaining a common nuisance, the Volstead Act (Title 27, *U. S. C. A.*) provides also a complete, harmonious and consistent remedy, wholly opposed to the Revenue laws, notwithstanding the Willis-Campbell Act.

We refer first to Section 39, which makes it unlawful to have or possess any liquor or property designed for the manufacture of liquor, or intended for use in violating the law, and which destroys property rights therein, and provides a search-warrant may issue and the liquor and containers thereof "and such property" shall be subject to such disposition as the court may make thereof, and provides further:

> "The liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order."

The Circuit Court of Appeals, Ninth Circuit, has construed this section, *In re Herter; Herter v. United*

States, 33 Fed. (2d) 400-402. So, if the searching officers took anything other than that prescribed by statute under their search warrant, or as authorized by the statute, it becomes apparent at once that in this case the authority therefor was lacking.

What is the remedy? Lewis was indicted for the maintenance of a common nuisance in connection with his unlawful possession and sales of intoxicating liquor contrary to the Volstead Act. He was arrested under a search-warrant, and the seizing Federal Prohibition Agents took, not only him into custody, but, exceeding the limits of their search-warrant, took the property here claimed into their possession. As pointed out in the supplemental statement of the case, Lewis defaulted and a new bond was fixed for his apprehension. Thus showing unmistakably the disposition of the government to prosecute him under the National Prohibition Act. In such cases seizures and confiscations are limited to the provisions of Section 39, Title 26, *U. S. C. A.* (*In re Herter; Herter v. United States*, supra.) The seizure was adopted by the government, and, under the law, the property, being in *custodia legis*, could be disposed of only as the court should direct, but not under any libel of information.

Where a party is found in possession of, or selling, intoxicating liquors contrary to law, a complete and adequate remedy is afforded. An injunction may be applied for at once, and if it be issued the *fixtures shall remain intact.* In such cases the court will issue a temporary injunction restraining all persons, "from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the

violation of this chapter constituting such nuisance." (Sec. 34, Title 27, *U. S. C. A.*)

In the case at bar Lewis was charged with the maintenance of a common nuisance under the National Prohibition Act. This fact is disclosed by the indictment on file against him. (R., 37.) Under these circumstances the court had a single duty to perform, and it was to abate the nuisance, as specifically provided, in concise, easily understandable language, by Section 34, Title 27, *U. S. C. A.* and Section 35 of the same title and chapter.

Certainly if the Congress had in view the fact that many innocent owners of automobiles might possibly be subjected to the penalties of forfeiture because of the unlawful transportation of intoxicating liquors in their cars, and used carefully chosen language to provide against such forfeiture and condemnation (*Richbourg Motor v. United States, et al.*, supra), it provided also an adequate remedy against possessors and sellers of intoxicating liquor by declaring the place of business, where the unlawful enterprise was being carried on, may be abated, but not destroyed, for a period of time following the alleged offense.

All the articles described in the libel are susceptible of legitimate use and it is not alleged any of them ever contained intoxicating liquor or in anywise were unlawfully used.

In re Herter; Herter v. U. S., supra.

But, counsel for the United States deny the applicability of the Richbourg decision to the facts in this proceeding. It is quite apparent that, in the position

they assume, they wholly ignore the ordinary rules of statutory construction so universally known as to require no comment. Carried to its logical conclusion, their contention would result in great injustice, if not absurdity. To illustrate: A. is observed in the act of driving a truck loaded with cases of goods, wares or merchandise. He stops in an alley in the rear of a hotel where he proceeds to discharge his cargo by removing it from the truck into the rear hotel entrance. While so engaged he is followed by Prohibition Enforcement Agents who discover he is depositing the cases in a barroom having magnificent and costly bar fixtures and furnishings, evidently placed there at some time in the past when the sale of intoxicating liquors was lawful. B. is behind the bar waiting on customers. He takes a bottle from a case A. has just delivered and is in the act of serving a customer from its contents when he is arrested by the Prohibition Enforcement Agents. A. also is arrested at the same time. The bottle is found to contain contraband intoxicating liquor. Further examination discloses the entire truck load of cases contain contraband intoxicating liquor. Under these facts A. must be prosecuted, and the truck must be disposed of, under the provisions of the National Prohibition Act, upon the authority of the Richbourg case. B. would be prosecuted under the provisions of the National Prohibition Act, for unlawful sale, unlawful possession, and for maintaining a common nuisance. The nuisance would not be abated as specifically provided by the terms of the National Prohibition Act, but the bar room would be stripped bare of its valuable furnishings so there would be nothing left for the court to abate. A temporary writ of in-

junction, "* * * restraining the defendant from conducting or permitting the continuance of such nuisance, until the conclusion of the trial." (Sec. 22, Title II, *National Prohibition Act* (27 *U. S. C. A.* 34) (Brief, 28), would be an idle gesture indeed. An order, "* * * restraining the defendant and all other persons from removing or in any wise interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance" (Id.) would be a farce. Proceedings *in rem* under the Revenue Statute would take hold, and make rid of the property.

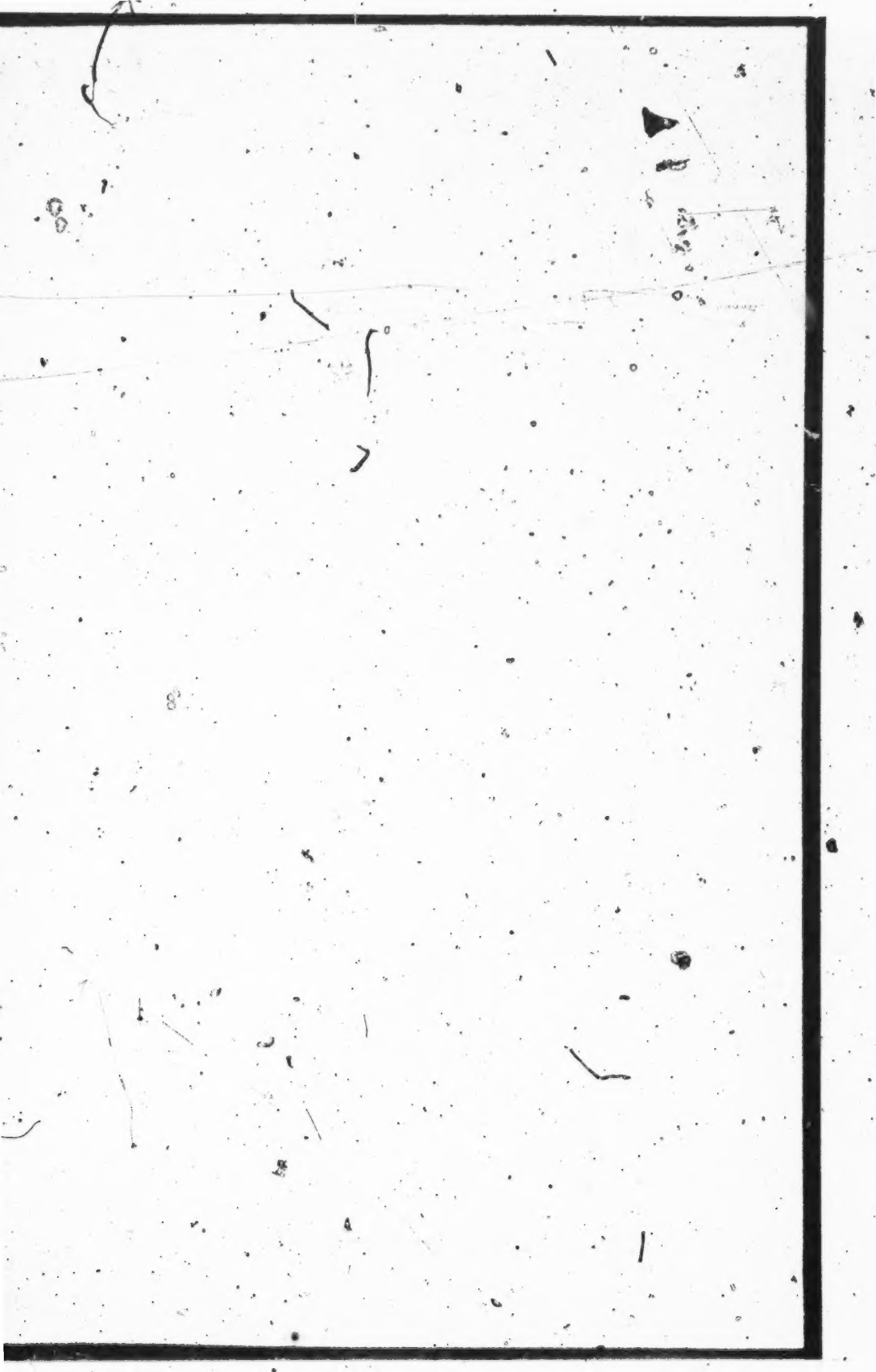
The Congress in enacting the National Prohibition Act, intended to and did write an act to enforce the provisions of the 18th Amendment to the Constitution that would enforce those provisions, and those provisions only. (*66th Congress,* 1st Sess., Vol. 58, No. 3, pp. 2891, et seq.)

It is submitted such was not the legislative intent when the Congress passed the National Prohibition Act.

The judgment should be affirmed.

Respectfully submitted,

GEORGE D. TOOLE,
C. S. WAGNER,
Counsel for Respondent.



SUPREME COURT OF THE UNITED STATES.

No. 49.—October Term, 1931.

The United States of America, Petitioner, *vs.* Edward Ryan, Claimant of One Brunswick Bar, etc. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 23, 1931.]

Mr. Justice Stone delivered the opinion of the Court.

Upon a libel filed by the United States in the District Court for Montana, praying the forfeiture of a bar, back bar, and other saloon furnishings and equipment, seized by Federal prohibition agents, it was averred that, at the time and place of seizure, one Lewis had in his possession tax-unpaid intoxicating liquors for the purpose of selling or removing them in fraud of the revenue laws.

Respondent Ryan intervened, claiming the seized property as owner, and set up that none of it was designed for the manufacture of intoxicating liquors, or intended for use in violation of the National Prohibition Act, or subject to forfeiture. At the trial it appeared from the evidence that at the time and place of seizure, the place being a so-called soft drink parlor, in fact used for the sale of intoxicating liquors as beverages, tax-unpaid liquor was possessed for sale and was being sold by Lewis. At the close of the evidence, both sides having moved for a directed verdict, the court withdrew the case from the jury and gave judgment for the Government, which the Court of Appeals for the Ninth Circuit reversed, holding that the forfeiture authorized by R. S. § 3453, 26 U. S. C. § 1185, is confined to chattels seized in places in which raw materials are manufactured into taxable articles in fraud of the revenue. 44 F. (2d) 951. This Court granted certiorari, 283 U. S. —, to resolve the conflict between the decision below and that of the Court of Appeals for

the Second Circuit, in *United States* v. *Ten Bottles of Scotch Whiskey*, 48 F. (2d) 545.

The only questions presented here are whether the seized articles are within the definition of the statute and whether forfeiture of them under § 3453 is barred by the arrest and prosecution of Lewis, who controlled or possessed them, for his violation of the National Prohibition Law.

Section 3453[1] contains three clauses. The first authorizes forfeiture of taxable "articles" found in the possession, custody or control of any person "for the purpose of being sold or removed by him in fraud of the internal revenue laws". The second authorizes forfeiture of "raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax", with intent to defraud the revenue. The third forfeits "all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found." To support the respondent's contention it is necessary to read the phrase "such articles" in the third clause as not referring to the taxable "articles" possessed with intent to defraud the revenue described in the first, but only to the "articles of a kind subject to tax" mentioned in the second, read to mean taxable articles which have been manufactured on the premises. That the phrase should be

[1] R. S. § 3453. All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal-revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the circuit court or district court of the United States for the district where such seizure is made.

taken to refer to the articles mentioned in both clauses would seem to be an admissible construction, less restrictive of its natural meaning than that urged.

We are not called upon to give a strained interpretation in order to avoid a forfeiture. Statutes to prevent fraud on the revenue are construed less narrowly, even though a forfeiture results, than penal statutes and others involving forfeitures. *United States* v. *Stowell*, 133 U. S. 1, 12; *Smythe* v. *Fiske*, 23 Wall. 374, 380; *United States* v. *Hodson*, 10 Wall. 395, 406; *Cliquot's Champagne*, 3 Wall. 114, 145; *Taylor* v. *United States*, 3 How. 197, 210.

Section 3453 is a reenactment of § 9 of the Act of July 13, 1866, c. 184, 14 Stat. 98, 111, amending § 48 of the Act of June 30, 1864, c. 173, 13 Stat. 223, 240. The earlier sections, like the present one, are each made up of three clauses, connected by the conjunction "and". In the first two acts, they constitute a single sentence; but in the present section the first clause appears as one sentence and the other two are combined in a second sentence. The first two clauses of all three acts are substantially the same. The third clause of the Act of 1864 provided for forfeiture of "all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure where such articles on which duties are imposed, as aforesaid, and intended to be used by them [persons intending to manufacture] in the fraudulent manufacture of such raw materials, shall be found . . ." The apparent purpose was to embrace within the forfeiture at least all personal property seized in the place where taxable articles are found, but the further qualification of the taxable articles as those "intended to be used . . . in the fraudulent manufacture of such raw materials", seems meaningless unless the phrase be transposed and read as meaning "and such raw materials intended to be used . . . in the manufacture of such articles". This is the substance of the amendment of 1866, when the third clause took its present form. We think the purpose of it was to remove the ambiguity and uncertainty of the quoted phrase, and not to restrict the forfeiture to chattels associated with the illicit manufacture, to the exclusion of those associated with taxable articles possessed with the purpose to sell or remove in fraud of the revenue, which were evidently intended to be confiscable by the section as originally drawn. We cannot assume that so radical

a change, if intended, would have been expressed by language so plainly capable of the opposite construction as that of the Act of 1866.

Nothing in the legislative history is suggested to indicate that such was the intention and there is no such plain or obvious distinction to be made, in a section devised for the protection of the revenue, between articles associated with illicit manufacture and those associated with illicit possession, each equally frauds upon the revenue, as to be persuasive that the present act was designed to hit the first and not the second. The companion section, 3450, authorizing the forfeiture of vehicles and horses used for propelling them, made no such distinction. By it, vehicles used for transporting or concealing taxable articles with the prescribed intent are forfeitable, as well as those used to transport or conceal contraband raw material or implements of manufacture. See *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505; *United States* v. *One Ford Coupe,* 272 U. S. 321.

The separation by the revisers of the first clause from the other two by a period instead of a semicolon, retaining the conjunction "And", and the dropping of the conjunction "also" from the second and third clauses, are changes hardly substantial enough to warrant any changed construction of the section. *McDonald* v. *Hovey,* 110 U. S. 619, 629; *Anderson* v. *Pacific S. S. Co.,* 225 U. S. 187, 199; see *Buck Stove Co.* v. *Vickers,* 226 U. S. 205, 213.

If the point were more doubtful, we should hesitate to set aside, at this late date, the uniform construction given to the section with respect to this question by the lower federal courts for more than sixty years. *United States* v. *Quantity of Rags,* Fed. Cas. No. 16103 (1868); *Quantity of Distilled Spirits,* Fed. Cas. No. 11494 (1868); compare *United States* v. *Thirty-Three Barrels of Spirits,* Fed. Cas. No. 16470 (1868); *United States* v. *Thirty-Six Barrels of High Wines,* Fed. Cas. No. 16468 (1870); see *United States* v. *Eighteen Barrels High Wines,* Fed. Cas. No. 15033 (1871); *United States* v. *Quantity of Tobacco,* Fed. Cas. No. 16106 (1872); compare *United States* v. *Distillery at Spring Valley,* Fed. Cas. No. 14963 (1873); *United States* v. *Sixteen Barrels of Distilled Spirits,* Fed. Cas. No. 16300 (1879); *United States* v. *One Ice Box,* 37 F. (2d) 120 (N. D. Ill. 1930); *contra, In re Hurley,* 37 F. (2d) 397 (W. D. N. Y. 1930); *United States* v. *Tel*

Bottles of Scotch Whiskey, 48 F. (2d) 545 (C. C. A. 2d, 1931). By the adoption of § 3453 in the Revised Statutes, as of December 1, 1873, without substantial change of the section as amended in 1866, Congress must be considered to have adopted the consistent interpretation of the latter as authorizing forfeiture of non-taxed articles found in a place in which taxed articles are either possessed or manufactured with intent to defraud the revenue. *Sessions* v. *Romadka*, 145 U. S. 29, 41-42; see *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488.

It is said that the construction urged by the Government is inadmissible because so broad as to lead to absurd results; that it would permit seizure of chattels having no relation to the taxable articles or their intended sale or removal, if anywhere in the same building or enclosure, and might include chattels possessed on the premises by others having no connection with the taxable articles or their intended sale or removal. But we do not so construe it. To do so would be to justify penalties having no relation to the offense, and the infliction of hardship on innocent persons unnecessary for the protection of the revenue. All laws are to be given a sensible construction. A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose. *United States* v. *Katz*, 271 U. S. 354; *United States* v. *Jin Fuey Moy*, 241 U. S. 394; *United States* v. *Palmer*, 3 Wheat. 610, 631.

Notwithstanding the broad language of the section, we think it may be given a reasonable construction, and the one most consistent with its apparent purpose, by the application of the principle *noscitur a sociis*. The taxed articles and the raw materials intended for manufacture are the principal things aimed at by the statute. Tools and implements by their use are connected incidents. By reason and analogy, as well as by context, we conclude that the general words "all personal property whatsoever" were intended to include chattels other than the specified tools and implements, but to be restricted to those which, like tools or implements, are related to one or the other of the principal things, or incident to their intended use or disposition in fraud of the revenue. See *United States* v. *Thirty-Three Barrels of Spirits*, *supra*. Here the seized articles, being the furnishings and equip-

ment of a room in which tax-unpaid intoxicating liquors were dispensed, were incident to the sale, and were so related to the tax evasion at which the statute was aimed as to be clearly embraced within both its purpose and its words.

Respondent's objection that forfeiture under R. S. § 3453 is barred by the arrest and prosecution of the offender under the National Prohibition Act is without force. It is true that by the express command of § 26 of the National Prohibition Act, in all cases of arrest for transportation of intoxicating liquors, the transporting vehicle must be seized and proceedings for its forfeiture had under that section and not under R. S. § 3450. *Commercial Credit Co.* v. *United States,* 276 U. S. 226; *Richbourg Motor Co.* v. *United States,* 281 U. S. 528. But by § 5 of the Willis-Campbell Act of November 23, 1921, c. 134, 42 Stat. 222, 223, all penalties for violation of the revenue laws, not directly in conflict with any provision of the National Prohibition Act, are continued in force. See *United States* v. *One Ford Coupe, supra.* There is no question here of use of a vehicle for transportation, and there is nothing in the National Prohibition Act necessarily or directly in conflict with the application given here to the provisions of § 3453.

Reversed.

A true copy,

Test:

Clerk, Supreme Court, U. S.